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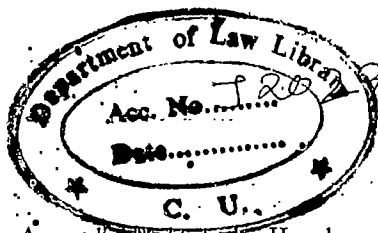
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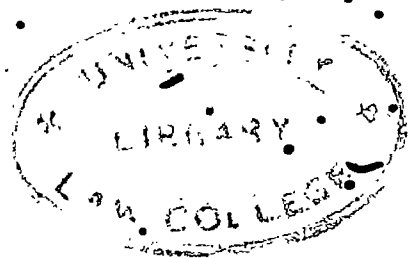
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THE MADRAS LAW JOURNAL.

[II]

[1944]

RETIREMENT OF MR. JUSTICE KRISHNASWAMI AYYANGAR.

Mr. Justice Krishnaswami Ayyangar has retired from the Bench after a tenure of just over six years. Prior to his appointment as Judge he had been Government Pleader for nearly three years. Having gone to the Bench after an active and varied practice at the Bar, he was familiar with all branches of the law. Unostentatious in manner and temperamentally somewhat reserved, the learned Judge always went through his work serenely and with the confidence born of learning. The form of his judgments, particularly those delivered after reservation, was always attractive and the exposition lucid. While at the Bar, the learned Judge had been associated with the late Sir Murray Coutts-Trotter in bringing out the ninth edition of Mayne's Hindu Law and had enjoyed a great reputation for his knowledge of that branch of law in special. By his retirement the Bench will be losing the services of a sound and able Judge.

THE PAPER CONTROL (ECONOMY) ORDER, 1944.

Legal publications have been hit hard by the promulgation of the Paper Control (Economy) Order. Production of paper by the Indian mills is expected to be much less than the normal outturn, during the current year. Consumption of paper no doubt ought not to exceed production, particularly as the hoarded stocks are believed to be already exhausted and there is not much chance of replenishment from other countries due to transport and other difficulties. The above-mentioned Order therefore directs among other things that no periodical, journal, etc., shall hereafter publish more than 30 per cent. of the number of pages which it was hitherto publishing. The basic year for making the calculation is the first quarter of 1944.

Everyone will agree that consumption should not outrun production. The imposition however of a flat rule to achieve the purpose will in its turn give rise to fresh difficulties. Periodicals and journals devoted to legal, scientific and cultural matters stand on a different footing from the rest. Special laws and ordinances are being promulgated from time to time on a large scale to cope with the new situations arising out of the war conditions. Many of them are by way of amendments to the existing law while others contain altogether new provisions. Many of the new laws (e.g., The Hoarding and Profiteering Prevention Ordinance, the Madras House Rent Control Order, etc.) touch intimately the everyday life of the citizen. Wide publicity of the laws is absolutely essential if transgressions thereof are to be minimized. Likewise dissemination of judicial expositions of the laws is equally essential. Ignorance of law will not be an excuse and it will not be fair to charge a person seriously with breach of rules if no facilities are available by which he can

know of their existence or of their interpretation. The members of the legal profession also will be handicapped seriously in the matter of giving correct advice. Any drastic cut therefore in the number of pages of law journals will have the effect of withholding from the public much useful and vital information.

Even in England, where according to Government spokesmen paper control is working extremely stringently, legal journals are able to give more than 50 per cent. of the number of pages they were hitherto publishing. There is no reason why, in India a harsher rule should be enjoined in regard to such publications. In this country ever since scarcity of paper in the market was experienced, journals have themselves voluntarily cut down the number of pages they were publishing and adopted other devices to minimise consumption. Thus, for instance, in regard to our Journal, the margins were cut, smaller types were used, spacing between the lines was reduced and special features were either altogether given up or published only on a restricted scale. Further drastic reduction in the amount of paper consumed cannot be achieved without serious impairment of the efficiency and effectiveness of our service.

To adopt 1944 as the basic year for working out the calculation will not be justifiable. To take 1939 or 1938 as the basic year will alone be proper. Many journals have already in view of the war conditions effected considerable reduction in the number of pages they were publishing during the last four years. By taking 1944 as the basic year, the journals that had effected economies will suffer more than others that had gone on as usual.

It is not the public and the members of the Bar alone that are concerned in the matter. The judiciary also may have to miss often the assistance afforded by prompt reporting of the latest decisions. It is our earnest hope and prayer that Government will find it possible to relax the rigour of the 30 per cent. rule in the case of legal publications. The Bar Associations in many places have already recorded their views about the necessity for such relaxation. If the 30 per cent. rule is strictly enforced, law reporting will seriously suffer and other legal publications such as the Monthly and Yearly Digests, which are wholly indispensable to the legal profession, may come to a stand-still.

SUMMARY OF ENGLISH CASES.

LEWIS FALK, LTD. v. JACOBWITZ, (1944) 1 Ch. 64.

Patents and Designs Act (1907 to 1942), section 36 (1) and (2)—Action to restrain defendant from suing plaintiffs for infringement of design—Burden of proof and the party who should begin.

The plaintiffs alleged that the defendant had threatened to sue them for infringement of a registered design and claimed an injunction to restrain him from doing so. The defendant admitted that he had made a threat and he alleged that the plaintiffs had imitated his registered design and counter-claimed for an injunction to restrain them. The plaintiffs in their reply said that the registration was at all times invalid and counter-claimed for rectification of the register by cancellation of the registered design. On the question of onus of proof and right to begin,

Held, it is for the plaintiffs in a "threat" action first to prove the threat or threats, and once that has been done, the onus shifts to the defendant and the burden is on him to prove that the acts in respect of which proceedings are threatened constitute or if done would constitute, an infringement of a patent or of a registered design. If the defendant succeeds in proving that, the burden then shifts again to the plaintiff to prove, if he can, that the patent or the registered design is invalid. In the present case the threat being admitted it is for the defendant to open his case first.

BECHER, *In re*, (1944) 1 Ch. 78.

Bankruptcy Act—Insolvent estate—Administration—Mortgagee of reversionary interest valuing his security and proving for balance—Subsequent rise in value of security—Amendment of proof—Discretion to order.

In the administration of an insolvent estate (in the same way as in a bankruptcy) the creditor has the right to amend his proof unless by something which has happened the position of the creditor and the trustee has become so altered. The mere fact that the creditor's

security had increased in value since his valuation of it did not take away his right to amend. The creditor has a right to amend until the amount at which he has valued his security has not only been tendered to him but accepted by him.

In re *Newton*, (1896) 2 Q.B. 403, applied.

REX v. LECKEY, (1944) 1 K.B. 80. (C.C.A.).

Criminal trial—Summing up—Murder charge—Suggestion by Judge that prisoner's silence after being cautioned that he need not reply, indicated guilt—Misdirection justifying quashing of conviction.

The prisoner was accused of murder and the police officer arresting him said informally, "You are not obliged to say anything unless you wish to do so, but whatever you say will be given in evidence". The prisoner said "I have nothing to say until I have seen someone, a solicitor." The judge in his summing up suggested that the jury might infer the prisoner's guilt by considering the fact of his silence after being cautioned. The prisoner was found guilty and sentenced to death. On appeal,

Held, that it amounted to a misdirection, and it is a proper ground on which the conviction should be quashed. If it were not so, a caution might obviously be a trap instead of the means for finding out the truth in the interests of justice.

Rex v. Naylor, (1933) 1 K.B. 685, relied on.

MARSH v. COMMISSIONER OF POLICE AND ANOTHER, (1944) 1 K.B. 99: (1944) 1 All E.R. 161 (K.B.D.).

Innkeeper's lien—Limited to luggage of guest—Ring obtained on approval from jewellers given as security for bill—Innkeeper only a pledgee and cannot exercise lien—True owner's rights.

On 24th November, 1942, N was received as a guest at the R Hotel where he stayed until 29th November, 1942, incurring a bill for 66l. 6s. 11d. On or about 25th November, 1942, N obtained from certain jewellers a ring of the larceny of which he was convicted on 12th January, 1943. On 28th November, 1942, N was asked by the hotel-keeper to pay his bill. N stated he was unable to do so, but produced the ring and handed it to the hotel-keeper as security for payment of the bill. When the jewellers claimed the ring as its true owners the hotel claimed it asserting that it had an innkeeper's lien on it.

Held: The innkeeper's lien is limited to articles which the innkeeper receives and on which he can put and keep his hand. As the ring was never received as part of the luggage the hotel had no lien on it but was a mere pledgee and cannot retain it as against its true owners.

EASTERBROOK v. EASTERBROOK, (1944) 1 All E.R. 90 (P.D.).

Husband and wife—Matrimonial action for declaration of nullity of marriage—Parties resident in England and marriage ceremony in England—Petitioner domiciled in Canada—Jurisdiction to pass decree of nullity.

The petitioner was domiciled in Canada and the respondent in England. Both were resident in England where the ceremony of marriage took place. In an undefended petition for nullity on the ground of wilful refusal of the respondent to consummate the marriage,

Held: There is jurisdiction in England to pronounce a decree of nullity.

(1927) A.C. 641 and (1937) p. 111, relied on; (1931) P. 29, dissented from.

BONITTO v. FUREST BROS. & Co., LTD., (1944) 1 All E.R. 21 (H.L.).

Practice—Admission of liability and payment into Court—Inconsistent pleading and notice of payment in—Effect—If takes away the right to dispute liability—Decree—If should not be for less than amount admitted and paid in—R.S.C. Order 22—Scope.

The judge who conducts the trial is necessarily concerned to decide the issues disclosed in the pleadings. Until those issues are decided, he has not before him, and he ought not to be informed of, the fact of any payment into Court, or of the terms of the notice of such payment. No doubt R.S.C. Order 22 contemplates that the notice should follow the pleading—rather the notice and the pleading should not contradict one another. It is irregular for a defendant to deny liability in his defence but to admit it in his notice of payment in. Such an irregularity must be corrected by an interlocutory application by the plaintiff asking that the notice of payment into Court should be set aside as being inconsistent with the defence and embarrassing. Where the inconsistency has not been corrected the decision on the issue raised by the pleading must stand notwithstanding the admission in the notice.

It is a mistake to suppose that if money is paid in with an admission of liability "it follows that liability is admitted for the amount paid in and judgment cannot be given for

less". The circumstance that the defendant was willing to pay a larger sum with an admission of liability is only relevant on the question of costs.

INGALL v. MORAN, (1944) 1 All E.R. 97 (C.A.).

Administrator—Title before grant of letters of administration—Writ issued before grant—Incurable nullity.

It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of an intestate's estate and can obtain in a proper case interim relief by the appointment of a receiver *pendente* grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well-recognised practice in the Chancery Division is to indorse the writ in the first instance for the only relief then obtainable, namely the appointment of a receiver *pendente* grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required.

But an action by a father to recover damages for the loss of expectation of life of his deceased son and for funeral expenses and damages to his motor cycle commenced by him before the grant of letters of administration is incompetent. The doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render the action competent which was incompetent when the writ was issued.

EGHAM AND STAINS ELECTRICITY CO., LTD. v. EGHAM URBAN DISTRICT COUNCIL, (1944) 1 All E.R. 107 (H.L.).

Contract for street lighting with electricity—Provision for abatement of charges if supply was curtailed for unavoidable causes—Black-out regulations preventing the lighting—Effect.

A clause in a contract for street lighting by an electric company provided "... no default by the company shall render the company liable in damages if and so far as such default shall arise or be occasioned by reason of fire, frost, accident, strikes, lockouts or combination of workmen or cessation or restriction of work by workmen or from any other unavoidable cause over which the company has no control. Provided always that all payments under the agreement by the District Council shall abate in the same proportion as the supply shall be curtailed by reason of any event provided for in this clause. The Lighting Restrictions Orders under the Defence Regulations having made it illegal to light the street lights the company claimed the charges under the agreement.

Held: The liability of the Council was suspended because of the operation of the provision for abatement in the event of the street lamps not being lighted owing to unavoidable causes.

RICHARDSON v. REDPATH BROWN & Co., LTD., (1944) 1 All E.R. 110 (H.L.).

Workmen's Compensation—Arbitration—Medical assessor—Proper functions of.

It is necessary to draw a clear distinction between the functions under the Workmen's Compensation Acts of a medical referee and of a medical assessor. The medical assessor's function is not to supply evidence but to help the judge or arbitrator to understand medical evidence. It is not part of the functions of a medical assessor as such to conduct a personal examination of the workman or to report the effect of the examination and his deductions from it to the arbitrator.

DIRECTOR OF PUBLIC PROSECUTIONS v. KENT AND SUSSEX CONTRACTORS, LTD., (1944) 1 All E.R. 119.

Company—Criminal liability—Intention of servants imputed to company—Petrol rationing—False returns by servants of company—Liability of company.

Where a limited company and an officer thereof were charged with producing a return, false in a material particular, with intent to deceive in respect of motor fuel ration order,

Held, that the company can be convicted for the offence though it is incapable of acting apart from its officers.

EVANS v. THE BRITISH DOUGHNUT CO., LTD., (1944) 1 All E.R. 158 (K.B.D.).

Merchandise Marks Act (1887), section 3—Trade description—Whole description to be considered in deciding whether the description was false.

In a prosecution of the respondents the charge was that they did "... unlawfully apply a false trade description to goods, to wit, a packet of 'Eggstead' in as much as it was

described on the packet as being equivalent in use to 12 eggs". It was proved that the following words appeared on the label of the packet "contains dried egg. (Foreign) contents equivalent in use to 12 eggs." The respondent successfully contended before the Magistrate that the wording used on the packet was not a trade description. On appeal,

Held: All the words upon the label must be looked at to see whether it is a trade description for deciding whether it is a false trade description. The words complained of read with the context, are an indication as to the material of which the goods are composed.

R. v. WOODWARD, (1944) 1 All E.R. 159 (C.C.A.).

Criminal trial—Request by prisoner that he ought to conduct his own case—Refusal and assignment of counsel—Propriety—Conviction—Validity.

A counsel allotted to a prisoner had returned his brief and the papers were handed over to another counsel; before the trial the prisoner said "I would rather not have legal aid. I would rather conduct the case myself" and requested that he ought to be allowed to conduct his own case.

Held, that a refusal of such request would result in an injustice to him and the conviction must be quashed although there was a good deal of evidence against the prisoner.

KENNEDY v. WALKER, (1944) 1 All E.R. 177 (C.A.).

Workmen's Compensation Act (1925), section 29 (2)—Failure of claim for damages at common law—Claimant asking judge to fix the compensation under Workmen's Compensation Act—If election taking away right of appeal against dismissal of claim at common law.

The plaintiff in a claim at common law against his employer for damages, being unsuccessful, in the exercise of the right conferred by the Workmen's Compensation Act, 1925, section 29 (2), asked to have an assessment of compensation made. The judge thereupon assessed the compensation but did not in fact at that moment draw up a certificate. In those circumstances the plaintiff appealed against the dismissal of the common law action.

Held, that the plaintiff had exercised her option as to the particular remedy which she will pursue by asking compensation to be assessed and therefore could not appeal in respect of her claim at common law.

UTOL, LTD. v. INLAND REVENUE COMMISSIONERS, (1944) 1 All E. R. 190 (K.B.D.).

Income-tax Act (1918)—All Schedules Rules, rule 20—"Dividend"—Payment of share of profits by one company to another under agreement to share profits and losses—If "dividend"

As a result of negotiations between two limited companies with a view "to some form of pooling of the interests of the two companies an agreement was arrived at" which provided *inter alia*, that the two companies should share the profits or losses in the proportion of 60 and 40 per cent. respectively. The assessee company paid the share of profits of the other company.

Held: The payment differs from interest or annuity. It is dividend in respect of which the assessee company was entitled under rule 20, to deduct tax from the payment so made and is not accountable to the crown for the amount so deducted.

"Dividend" in rule 20 of the All Schedule Rules of the Income-tax Act include profits to be divided between those who claim by contract as well as those who claim as shareholders.

10 A.C. 438, relied on.

MELLOWS (H. M. INSPECTOR OF TAXES) v. BUXTON PALACE HOTEL, LTD., (1944) 1 All E. R. 223 (C.A.).

Income-tax—Compensation received for premises requisitioned under Defence Act—If "rent" assessable to tax under the Finance Act, section 15.

On a consideration of the provisions of the Finance Act (1940), section 15 and the Compensation (Defence Act), (1939), *held*, that the compensation payment made by the Crown for requisitioned premises must be treated as "rent" for income-tax purposes.

Re HOOPER: PHILIPS v. STEEL, (1944) 1 All E.R. 27 (Ch. D.).

Will—Annuity free of all deductions—Liability to income-tax—Not such deduction.

Where an annuity free of all deductions whatsoever is given under a will the annuity is not given free of income-tax. If a testator means a specified annuity to be received clear of income-tax he should say so in express terms and not use a general formula.

Cowlisha v. Cowlisha, (1939) Ch. 654, dissented from;

HOLMES v. HADFIELDS, LTD., (1944) 1 All E. R. 235 (C.A.).

Factory—Duty to prevent crane coming within 20 feet of where workman was likely to be struck—Injury to workman by a tool dislodged by crane coming within 20 feet of work spot though workman was in a place where he was not liable to be struck by the crane—Liability.

The duty laid down by section 24 (7) of the Factories Act, 1937, to prevent a crane approaching within 20 feet of the place, where a workman is working, if he is liable to be struck—is an absolute duty. The fact that the workman when injured was in a place where he could not have been struck by the crane or that he was struck by a tool dislodged by the crane is immaterial.

Re OSMAND, (1944) 1 All E.R. 262 (C.A.).

Will—Gift for furtherance of psychological healing—Validity as gift for promotion of medical education.

A testatrix left the whole of her estate to executors ".....upon trust in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teachings of Jesus Christ." On a question as to its validity.

Held [reversing (1944) 1 Ch. 66; (1944) All E.R. 121], that the bequest was for the furtherance of medical education and as such a valid charitable disposition and the gift did not fail for uncertainty.

Re GOTT; GLAZENBROOK AND SHEEN v. THE UNIVERSITY OF LEEDS AND OTHERS, (1944) 1 All E.R. 293 (Ch. D.).

Will—Gift for creation of scholarships for male students of British and Christian parentage—Gift not bad for uncertainty.

A bequest was made to the Council of the University of Leeds of £3,000 upon trust that the sum shall be invested and the income thereof utilised for the creation of a scholarship in connection with the said University for the benefit of any one or more male students of British and Christian parentage who shall have graduated in honours in one or more of the schools of a University situated in Great Britain or North Ireland or in one of the Colonies or Dominions of Great Britain who shall desire to commence or shall have commenced some form of post-graduate study at the University of Leeds, such scholarship or scholarships to be created for such objects and purposes and be tenable for such periods as the council of the University shall in its uncontrolled discretion determine.

Held, that the gift is a good charitable bequest and does not fail for uncertainty.

Re WHITLY; PUBLIC TRUSTEE v. WHITLY AND OTHERS, (1944) 1 All E.R. 299 (C.A.).

Will—Bequest of "jewellery" now deposited in safe deposit—Unmounted cut diamonds in safe deposit—If included—"Now" meaning.

The word "jewellery" would cover jewels collectively and would cover gems sold by jewellers just as it covers the case of jewels made up into an article of adornment such as a brooch or anything of that kind. Where a bequest is made of all "jewellery now in safe deposit" it would include unmounted cut diamonds also. Though a will speaks as from the date of the testator's death, in the context, the word "now" clearly speaks of the date when it was executed and refers to jewellery which at that date were deposited in the place mentioned.

LACE v. CHANDLER, (1944) 1 All E.R. 305 (C.A.).

Lease—Lease for duration of war—Uncertainty of term—Effect.

In an action by a landlord to recover possession of a dwelling house let on a weekly tenancy the tenant claimed that the house was let to him for the duration of the war.

Held, that a tenancy for the duration of the war does not create a good leasehold interest because of the uncertainty of the term. A term created by a leasehold tenancy agreement must be a term which is either expressed with certainty and specifically, or is expressed by reference to something which can at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. Where the term is capable of being rendered certain, it must be so "before the lease takes effect".

N. E. NETER & CO., LTD. v. LICENCES AND GENERAL INSURANCE CO., LTD., (1944) 1 All E. R. 341.

Insurance—Marine policy—Rough weather usual at such time damaging cargo—If peril of sea and a fortuitous happening.

A marine policy of insurance covered perils of seas. The cargo at its destination was found to be damaged as a result of rough weather encountered during the voyage. In a

claim on the insurance it was contended that the rough weather being such as was normally to be expected on such a voyage it was not a fortuitous happening or peril of the sea.

Held: Although the weather is not fortuitous, damage due to the weather is something beyond the ordinary wear and tear of a voyage. Accordingly it may be a "peril of the sea" insured against.

DICKINSON v. ST. AUBYN AND ANOTHER, (1944) 1 All E.R. 370 (C.A.).

Lease—Lease for seven years with option to tenant to terminate at end of five years—Covenant by tenant to do decorative repairs in the last quarter of the said term—Determination of lease, at end of five years—Obligation to carry out the repairs.

A lease for seven years with an option to the tenant to terminate it at the end of five years included a covenant by the tenant "to paint in the last quarter of the said term". The lease having been terminated at the end of five years the landlord contended that the obligation to paint applied whether the term was for seven years or five years under the option to shorten it.

Held, considering the distinction between the words "said term" and "said tenancy" used in the other clauses of the lease the words "said term" must be construed as applying to the term of seven years and there is no obligation to paint where the lease is terminated at the end of five years.

Decision of Hilbery, J., (1944) 1 K.B. 10, reversed.

GEORGE MONRO, LTD. v. AMERICAN CUANAMID AND CHEMICAL CORPORATION, (1944) 1 All E.R. 386 (C.A.).

Practice—Service of writ out of jurisdiction—Leave when granted—Tort committed out of jurisdiction though damage occurring within jurisdiction—Leave to serve writ out of jurisdiction cannot be granted—R.S.C., Order 11, rule 1 (ee)—Scope.

Leave to serve a writ out of jurisdiction can be granted under R.S.C., Order 11, rule 1 (ee) only where an action is founded on a tort committed within jurisdiction. It is not sufficient that damage resulting from the tort has occurred within the jurisdiction—though it may be a gist of the action.

CORPORATION OF FOREIGN BONDHOLDERS v. INLAND REVENUE COMMISSIONERS, (1944) 1 All E.R. 420 (C.A.).

Income-tax—Corporation formed to protect the rights and interests of investors in foreign bonds in the United Kingdom—Not one for charitable purpose entitled to exemption from income-tax.

Where the object of a corporation was to enable a limited class of investors in foreign bonds to protect, so far as possible, their investments and to get their money back, or as much of it as can be extracted from a foreign government it cannot be said that the corporation is one established for a charitable purpose in that it is beneficial to the community. Accordingly the corporation is not entitled to exemption from income-tax.

JACKSON v. FISHER'S FOILS, LTD., (1944) 1 All E.R. 421 (K.B.D.).

Defence Regulations—Essential work—Dismissal of employee for misconduct—Order by appropriate tribunal for reinstatement—Employer if bound to provide work also.

A firm engaged in an "essential work" dismissed an employee for misconduct. The national service officer after inquiry ordered the reinstatement of the employee. The firm though they paid the basic wages did not provide the employee with any work. On a construction of the order,

Held, that "reinstatement" does not consist merely of paying an employee his wages, but includes the provision of work unless there is no work available for the employee to do in the firm.

S. (OTHERWISE B.) v. S., (1944) 1 All E.R. 439 (P.D.).

Divorce—Decree nisi of nullity—Order for payment of alimony pendente lite—Alimony whether payable till decree absolute or stops with decree nisi.

A wife petitioned for a decree of nullity on the ground of her husband's impotence or alternatively his wilful refusal to consummate the marriage. The husband in his answer admitted that the marriage had not been consummated but alleged that the failure was due to the wife's impotence or, alternatively, her wilful refusal and asked for a decree of nullity in his favour. There was an interim order that the husband should pay the wife alimony pendente lite. Later there was a decree nisi in favour of the husband who ceased thereafter to pay the alimony. On a summons by the wife asking that payment of alimony should be continued until decree absolute,

Held, that the order for alimony *pendente lite* continued in force until the decree absolute or until it was discharged or varied by the Court. It is always open to the husband to apply to the Court for such an order.

Re McELLIGOTT: GRANT v. McELLIGOTT, (1944) 1 All E.R. 441 (P.D.A.).

Real property—Bequest to wife and her heirs for her and their use and benefit absolutely and for ever—Absolute gift to the widow only—Rule in Shelley's case not applicable.

A will provided that all the residuary estate be given to the wife and her heirs for her and their use and benefit absolutely and for ever.

Held, that this was an absolute gift to the widow. No interest is by the will "expressed to be given" to the heir nor does the rule in *Shelley's case* (1 Co. Rep. 93) apply to the gift.

Re DAOUST: DOBELL v. DOBELL AND OTHERS, (1944) 1 All E.R. 443 (Ch.D.).

Will—Bequest to "nephews and nieces"—Persons related by affinity—How far included.

A will left by a widow directed a division of her residuary estate ".....in equal shares *per capita* between such of my nephews and nieces and descendants of nephews and nieces as shall be living at the date of my death and shall attain the age of twenty-one years or being female marry under that age." On a construction as to the meaning of the words "nephews and nieces",

Held: Though the strict and proper meaning of "nephew and niece" is children of a brother or sister the meaning is susceptible of extension having regard to the context and circumstances of the case in two directions. First of all the word may describe the child of a brother-in-law or of a sister-in-law, and in the second place "nephew" is often used to indicate a niece's husband and "niece" is often used to describe the wife of a nephew. Other exceptions may have to be made in special circumstances as for example, in the case of an adopted child.

Unless compelled by context or circumstances the Court will always construe a class gift to nephews and nieces as a gift confined to children of a brother or sister, and the mere fact that the testator or testatrix has chosen elsewhere in the will erroneously to describe as nephew or niece some person not strictly and properly so related to him or her will not affect the general rule by admitting that person into the class.

As in the will under construction the testatrix left only one niece and not even a nephew and the gift was made to the class *per capita*, other persons by affinity ought to be added in the class of nephews and nieces in the circumstances of the case.

W. (OTHERWISE B.) v. W., (1944) 1 All E.R. 446 (P.D.A.).

Divorce—Petition by wife for nullity on the ground of husband's incapacity—Order for particulars—If can be made.

In an application for particulars of a plea contained in the petition of a female petitioner alleging that the respondent was at the time of the ceremony of marriage and has ever since been incapable of consummating the same,

Held, that particulars of the nature of the incapacity alleged should be filed and delivered to the respondent in the petition.

BOOK REVIEW.

THE HOARDING AND PROFITEERING PREVENTION ORDINANCE, 1943, with Commentaries, by Messrs. A. Arunachalam, R. Srinivasan and R. Mathrubutham, Advocates, 100 pages. Price Rs. 2-8-0.

This is a book by three enterprising advocates. The Hoarding and Profiteering Prevention Ordinance is a measure designed to control inflation of prices of articles of common use. It corresponds to similar measures in the United Kingdom and the United States of America like the Prices of Goods Act, 1939 and the General Maximum Price Order, 1942, respectively. The present compilation gives in a handy form the various orders and notifications issued from time to time up to the end of June, 1944. The annotations are helpful and the citation of the relevant English decisions is a welcome feature. The introduction by C.C. Desai, Controller-General of Civil Supplies, makes interesting reading. The book is sure to be of great use to lawyers and laymen alike. We cordially welcome the publication.

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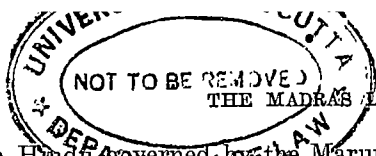
THE DRAFT HINDU CODE.

Codification laudable.—The codification of the principles of Hindu law has always been a desideratum. The liberalism characteristic of Hinduism has through the centuries brought within its fold peoples with differing tenets and practices and with differing degrees of culture. Development of solidarity and unity among Hindus will hardly be compatible with the persistence of diversity in their secular laws and institutions. The draft Hindu code constitutes an earnest attempt to integrate the laws applicable to the Hindus in the different parts of the country and to evolve a set of rules uniformly applicable to all of them alike. It is true that even if the code becomes law different systems of rules may yet operate regarding agricultural land in the provinces unless the latter fall into line with the centre. This is no doubt unfortunate but is altogether the result of constitutional limitations on the powers of the Central Legislature.

Not all proposals acceptable.—The Explanatory Statement to the draft code mentions that the draft is only “tentative,” and the Committee should not be regarded as “wedded to any of its provisions”. Constructive suggestions and criticism should therefore be welcome. A study of the draft discloses that principles have at times been made to yield to other considerations and novel doctrines have occasionally been propounded running counter to natural reason and principles of justice. Rationalistic ideas, considerations of spiritual benefit, relics of patriarchal theory, desire for simplicity are all to be found commingled. Some of the important proposals in the draft code are: (i) the total elimination of the Mitakshara coparcenership; (ii) the abolition of the doctrine of limited estate for woman in inherited property; (iii) the dissociation of the doctrine of spiritual benefit from property law; (iv) secularisation of the institution of marriage, and (v) provision for dissolution of marriages. An attempt is here made to indicate a few of the points requiring reconsideration if the proposals are to be acceptable to the general public.

Saving of Customs.—Clause (3) of Part I provides that customs and usages not expressly saved would stand superseded. Among those so saved are: (i) usages relating to succession by which any estate descends to a single heir [Clause (1) (ii) of Part II]; (ii) usages permitting marriage between sapindas [Clause (3) (d) of Part IV]; (iii) usages relating to the solemnisation of sacramental marriage [Clause (4) (1) and alternative Clause (5) of Part IV]; (iv) usages permitting divorce [Clause (32) of Part IV]; (v) usages relating to *illatom* adoption made before the commencement of the code [Clause (2) (1) (c) of Part II] and (vi) usages governing devolution of the property of an ascetic [Clause 11 (2) (b) of Part II].

Marumakkathayam, etc., usages.—It is to be noted that though the provisions of the draft code relating to intestate succession will not apply to any pro-



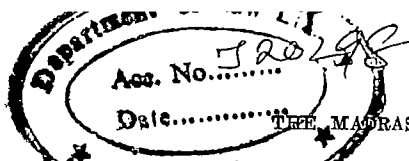
perty of a Hindu governed by the Marumakkathayam, Aliya Santana or Namudri law of inheritance [see Clause (1) (iii) of Part II] the other parts of the code would be applicable to him. All matters outside succession to property are to be governed by the provisions of the code. Even as regards succession Clause (27) of Part IV provides that if such a Hindu contracts or has contracted a civil marriage with any other Hindu either under that Part or under the Special Marriage Act, 1872, succession to *his* property and to the heritable property of *the issue of such marriage* shall be regulated according to the provisions of the code only.

Agricultural lands.—Clause (1) (i) of Part II states that the rules relating to intestate succession in the code shall not apply to agricultural land except in the Chief Commissioners' Provinces. Clause 19 (4) of Part VI, however lays down that where an adoption is made by a widow although she is not a simultaneous heir in regard to agricultural land in the province, yet she shall be divested of only one half of the properties vested in her on the death of her husband, son, son's son or son's son's son. Power is claimed to legislate on the ground that adoption is in the concurrent list and hence its effect including the divestiture of property will be *intra vires* the Central Legislature. It is doubtful if the claim is valid. Adoption constitutes the appointment of an heir to the property of the adoptive parents. What the legislature cannot do directly it cannot do indirectly. Succession to agricultural land being a matter left to the Provinces to legislate upon, an indirect manipulation of it may not be permissible. Clause (19) (4) of Part VI may for this among other reasons be dropped.

Intestate succession. Classification of heirs.—Four classes of heirs are recognised. They are (i) persons related by legitimate kinship, (ii) persons deemed to be so related, (iii) persons related by adoption and (iv) non-relations in certain cases. The second is a new category. It is an off-shoot of the provision for obtaining a declaration of nullity of marriage consequent upon the existence of a previous husband or wife at the time of the marriage, the parties having however acted in the full belief that such husband or wife was not living at that time, or on the ground of the lunacy or idiocy of either party thereto. The children born of the marriage prior to its being set aside are to be affiliated to their parents and to be deemed legitimate *in all respects*. Under the Hindu law the children born of the woman who had re-married while the first husband was alive would be illegitimate. There is no reason to justify a revision of the rule. Nor is there any reason to discriminate between a case of nullity arising by reason of the above factor and any other case of nullity. Such cases are bound to occur only rarely. It will be advisable to drop Clause (29) (4) of Part IV. Conceding of rights of inheritance to children born of a marriage set aside as a nullity will hardly fit in with the denial of such rights to a *dasi-putra*.

Sharing between simultaneous heirs.—Simultaneous succession by son, widow and daughter to the property of a male, and, by son and daughter, grandson and granddaughter to the property of a woman being provided for, it is laid down that in the property of the male the sharing is to be 2: 1., between son and daughter, and in the property of the woman it shall be 1:2. This may be intelligible as striking a balance between son and daughter. To carry the principle further and make it apply to succession by grandchildren to *stridhana* property seems to be indefensible. It is suggested that Clause (14) (c) of Part II should be revised.

Dasi-putra.—Legitimate relationship is made the primary basis of succession. Illegitimate children are cut out. There is therefore no need for the reference to *dasi-putra* in Clause 2 (1) (c) of Part II. The reference may be omitted.



Dancing girls.—A consequence of legitimate relationship being made the basis of succession is that there can be no inheritance to the property of dancing girls except in the cases where they might have contracted valid marriages and led a family life. There is no reason why their property should be made to escheat to the state instead of being allowed to be taken by their relations in the family of their birth or by their own off-spring. A special rule of succession will therefore have to be provided to meet their case.

Aurasa and adopted sons.—The aurasa and adopted sons are treated alike for purposes of succession. This gets rid of unnecessary distinctions resting upon caste and schools of law.

Sons born of wives of different castes.—Identity of caste having ceased to be a condition precedent of a valid marriage under the code, discrimination between sons born of wives of different castes is also abolished. Clause (17) of Part II expressly postulates such a result. The rule is hardly acceptable. Hindu society has not altogether abjured ideas as to the spiritual value of a son born of a wife equal in caste and the prevailing sentiment in the matter cannot be ignored. The existing rule of Hindu law might be left undisturbed. Nor is the suggestion in the code consistent with the provision in Clause (13) (ii) of Part VI laying down that an adopted son should be of the same caste as the adoptive father.

Undivided, divided and after-born sons.—There is no reference in the code anywhere to the case of a son born to a person after a partition between him and his then existing son or sons. Clause (7) (b) of Part II provides that each son of the intestate shall take one share whether he was undivided or divided from or reunited with the intestate. The accompanying note claims that in this respect "the view which leads to the simplest rule has been adopted". A little reflection will show that the provision is likely to produce unjust and iniquitous results. Suppose *X* possessing property worth Rs. 80,000 has three sons *A*, *B* and *C*; *A* separates taking for his share Rs. 20,000; *X*, *B* and *C* continue undivided and later on *X* has an after-born son *D*. On the death of *X*, under the existing law, his share would pass to the undivided and after-born sons to the exclusion of the divided son. *B*, *C* and *D* would each get property worth Rs. 20,000. The result does not entail any injustice. If *X* had more than one after-born son each sharer would get less than what *A* had taken but that is a risk which the undivided son always takes. Under the code however on the death of *X*, his share worth Rs. 15,000 would pass to the four sons *A*, *B*, *C* and *D* equally. In the result *A* would have become entitled to Rs. 23,750 whereas *B*, *C* and *D* would each get only Rs. 18,750. Is this to be the reward of filial duty? Apart therefore from the doubtful merit of simplicity, the provision in the code has no other virtue about it. It will therefore be advisable to revise Clause (7) (b) of Part II and enact that among the sons of an intestate those who were undivided from or reunited with him shall take in preference to those that were divided.

Daughter-in-law excluded.—The daughter-in-law is taken out from the category of heirs into which she had been introduced by the Hindu Women's Rights to Property Act, 1937. This is not likely to cause any real injustice since every daughter-in-law is also a daughter of her father and in that capacity is likely to get a share of the latter's property.

Son's daughter and daughter's daughter.—Among the heirs in the "compact series" under the code—see Clause (5), Class I, of Part II—the brother is brought in immediately after the father, the son's daughter and daughter's daughter being placed in Class II. This is neither logical nor in conformity with the dictates of natural affection. The sensible thing will be to transpose those two heirs from Class II to Class I and place them before the brother and immediately after the father.

Uterine brother.—The definition of "half-blood" in Clause (5) (e) of Part I omits altogether from its purview brothers born of the same mother but by different marriages. This cannot be the result of an oversight since uterine blood as giving rise to prohibited relationship for purposes of marriage is expressly adverted to in the Explanation to Clause (1) of Part IV. The ruling in *Ekobd v. Kashiram*,¹ seems to recognise the heritable capacity of a uterine brother. When mother's mother, mother's father and his descendants are recognised as heirs there is no justification for refusing the mother's son or daughter by a different husband a place in the line of heirs. Accommodation should be found for them in Class VI of the enumerated heirs and at the top.

Position of sister and sister's son.—The placing of the sister and the sister's son in Class III after the brother's son's/son is arbitrary. There is no reason why they should not be placed immediately after the brother and the brother's son respectively.

Two lines of devolution of stridhana.—The prescription of different lines of devolution concerning the stridhana of a widow according as it is property inherited from the husband or other property is hardly intelligible except as a compromise between the theory of limited estate in property inherited by a woman favoured by the Courts and Vignaneswara's view that such property also would be stridhana. The discrimination is needless and is not going to improve the son's position substantially.

Elimination of coparcenary.—One of the most revolutionary proposals in the code is the abolition of the institution of coparcenary. The effect of Chapter I of Part II-A doing away with survivorship and right by birth is tantamount to its destruction. A unique contribution of Vignaneswara which had survived the passage of many centuries despite persistent inroads made into it and which had fitted very well into the rural economy of the country will thus cease to exist. Whether the institution has outlived its purpose is certainly controversial. Bengal has done away with it. The explanation afforded is that trade and commerce can flourish only if property can be easily alienated. The same consideration must have prompted the present proposal. If the draft proposals are accepted the law of debts founded on the theory of the son's pious obligation will also be eliminated.

Marriage and divorce.—Part IV of the code dealing with marriage and divorce is likely to provoke considerable criticism. The definition of sapinda relationship in Clause (1) (a) (i) is not comprehensive and fails to subsume the descendants of a person. The definition should therefore be recast.

Degrees of relationship.—The statement on "the degrees of relationship prohibited by this Chapter" in Clause (1) (b) of Part IV is incomplete and does not include such cases as those of grand-uncle and grand-niece, grand-nephew and grand-aunt, children of two sisters, etc., cases where the taboo of inter-marriage is as strong as in the enumerated cases. The statement will therefore have to be revised.

Classification of marriages.—The division of marriages into sacramental and civil seems to be unreal. How can a marriage which transgresses spiritual precepts be ever sacramental? Reading the definition of a Hindu, in Clause (2) (ii) of Part I, with the rule in Clause (3) of Part IV permitting a sacramental marriage between "any two Hindus" and the provision in Clause (4) that a sacramental marriage may be solemnised in accordance with the customary ceremonies of either party thereto, it would follow that a marriage between a Hindu and a Buddhist, Sikh or Jain performed according to the customary ceremonies of the latter party can be a sacramental Hindu marriage. Is this not a travesty

of a genuine Hindu sacramental marriage? According to the draft code requirements as to difference in gotra and pravara, and sameness of caste are dispensed with. If these requisites are to be abrogated why term the marriage as being still sacramental? If liberty to marry outside the caste or inside the gotra is desired why should not provision be made for such marriages to be contracted as civil marriages? It is necessary to amend Clause (3) by making identity of caste and difference of gotra pre-requisites of a valid sacramental marriage and drop sub-clauses (a) and (b) of alternative Clause (6) and have that Clause wholly recast.

Impotency as a bar to marriage.—Lunacy or idiocy at the time of the marriage invalidates the marriage according to Clause (3) and Clause (29) (1) (iv) of Part IV. Impotency has been held equally to be a bar to a valid marriage, *Ratan Moni Debi v. Nagendra Narain*¹. Clause (29) (1) (i) of the draft code also seems to recognise that impotency is a bar. In the circumstances, Clause (3) will have to be amended by adding the words "or an impotent person" after the words "or an idiot".

Registration of sacramental marriage as civil marriage.—The provision in Clause (18) for the registration of sacramental marriages as civil marriages is uncalled for and may be dropped. The code concedes a right of divorce in the case of sacramental marriage celebrated subsequent to the passing of the code. Also registration of such marriages for facilitating proof thereof is separately provided for. Excepting possibly in a case where two sapindas have contracted a sacramental marriage in the absence of a custom sanctioning such alliances—see Clause (29) (1) (iii) of Part IV—the registration of the marriage later on as a civil marriage has no advantage to confer. It cannot be that the Committee wants to confer through this process on a party to a sacramental marriage celebrated before the code became law a right to have the marriage dissolved, though Clause (18) (c) would seem to suggest such a result by reason of the provision that where a sacramental marriage is registered as a civil marriage "the marriage shall be deemed to have been a civil marriage, for all purposes as from the date of the original ceremony." To do so will be to confer a right of divorce with retrospective effect not directly but by resort to a subterfuge. Clause (18) should therefore be omitted.

Right of husband to live separately.—Clause (26) prescribing the duties of husband and wife mentions only the circumstances when a wife can justifiably live apart from her husband without forfeiting her right to maintenance. There is no enunciation of the wife's duties nor mention of the circumstances when the husband may justifiably live separately from his wife and without any liability to maintain her. Grounds like suffering from loathsome diseases, apostacy, cruelty and desertion are grounds common to both. The lacuna should therefore be cured and the Clause amended so as to confer on the husband also a right to live separately under specified circumstances.

Dissolution of marriages.—Clause (30) mentions the grounds on which either spouse can obtain a dissolution of marriage. Sub-clause (b) mentions virulent and incurable leprosy as one of the grounds and sub-clause (c) specifies venereal disease as another ground. Does that mean that any other infectious and loathsome disease (e.g., epilepsy) will not afford ground for seeking dissolution of a marriage? Will it not be better if the grounds set out in Clause (26) and those specified in Clause (30) are worded alike subject only to the prescription in the latter wherever necessary of the period during which the cause should have been subsisting? Again under sub-clause (f) of Clause (30) dissolution can be had if the husband has any other woman as a concubine or if a wife is a concubine of any other man or leads the life of a prostitute. Does that mean that if a husband commits adultery with different women or even

with the same woman without however keeping her as a regular mistress or concubine or if a woman commits adultery remaining under the very roof of the husband or without definitely living with any person as his concubine or carrying on as a prostitute, the matter is not reprehensible enough as to afford cause for divorce? It is better to amend sub-clause (f) so as to make adultery of either spouse a ground for divorce.

Right to give in adoption.—Part VI deals with adoption. The provision in Clause (12) (2) that a father may give his son in adoption without any reference to the mother and notwithstanding her dissent is scarcely justifiable. It is opposed to all sense of justice and fair play. The wife is a joint author. If any, her interest in her boy is more deep rooted. The very reason that impelled the author of the Mitakshara to prefer the mother to the father in the matter of succession to the son's property teaches that before the maternal tie is sought to be snapped her feelings should be fully consulted and her permission obtained. The rule as framed in the code is presumably taken from Mayne's Hindu Law. The statement there however rests on authority supposed to be afforded by two rulings cited there. Those rulings in fact do not countenance the statement of law as made. They only say that when a man gives his son in adoption he would seem to exercise a power "more like that of an absolute proprietor than that of a guardian". That does not mean that the wishes of the mother of the boy could be over-ruled and her dissent ignored. Justice and equity require that the rule should be dropped.

Starting point of adopted son's rights and divestiture of widow's rights.—Clause (18) provides that the adoption will take effect from the date of adoption. As regards the quantum of rights Clause (19) (1) lays down that where the adoption has been made within 3 years of the death of the adoptive father the adopted son will be entitled to all the rights which a son born of the adoptive father would have been entitled in the father's estate *as it stood at the time of his death*. The theory of constructive pregnancy rejected by the judicial decisions is sought to be resuscitated. The note on this Clause assumes that the estate is not carried away but remains intact and is available for redistribution. Suppose in the interval, the widow had alienated the properties to a third person for value or had made a *bona fide* gift thereof in favour of her daughter. Is it intended that the transferee in such cases should be compelled to restore the properties for being made available to the adopted son to take? Will not such a result entail a negation of the absolute rights taken by a female heir in inherited property under the code? Again why the limit of three years?

Clause (19) enunciates another principle which is hard to justify. It provides that the adopted son shall take one half of whatever estate the adoptive mother inherited from her husband or from her son, son's son or son's son's son. The first part of the rule is intelligible. Why should the adopted son have however a share of the property inherited by the mother as heir to her deceased son, son's son, etc.? Even a son born of her womb cannot lay claim to a share of such property. Why should the adopted son stand on a higher footing? It is true that under the Hindu law as it now stands that is the position. The result has however been deplored. Instead of remedying it why should it be perpetuated?

Again under sub-clause (3) where the adoption takes place more than three years after the death of the adoptive father, it is one-half of the estate *as it stood immediately before the adoption* that is to be divested in favour of the adopted son. This is as it should be. Sub-clause (1) however prescribes *the date of the adoptive father's death* as the date with reference to which the rights of the adopted son will have to be worked out where the adoption is made within three years. There is no need to have these two different dates. It would be proper that in all cases the adopted son's rights should be worked

out as with reference to the date of the adoption only. Clause (19) should therefore be amended so as to make clear *firstly*, that the adopted son will be entitled to rights in the estate *only as it stood at the time of the adoption and secondly*, that he can divest the widow of one half of the estate she had inherited from her husband but not of any other property.

Minority and guardianship.—Part V. of the draft code deals with minority and guardianship. Guardianship for purposes of marriage is covered by Part IV. It is somewhat bewildering to find an unnecessarily large number of age limits prescribed for different purposes. Five such limits, 14, 15, 16, 18 and 21 are to be noticed. Marriage of a girl below 14 or of a boy below 18 is an offence. This provision of the Sarda Act is retained. Under Clause (7) (3) of Part IV these age limits apply to civil marriages as well. Under Clause (3) (e) of Part IV consent of a guardian to a sacramental marriage is essential if the bride is below 16 years—*Cf.*, Clause 23 (1) (a). In the case of a civil marriage the consent of guardian is made necessary if either the groom or the bride is below 21 years of age [Clause (7) (iv) and (23) (i) (b) of Part IV]. In regard to adoption Clause (5) (i) of Part VI fixes 15 years as the limit beyond which alone competency to adopt arises. For purposes other than marriage and adoption Clause (1) (a) of Part V fixes 18 years as the age of majority. There is absolutely no justification for prescribing these diverse age limits. For marriage and adoption 18 for boys and 14 for girls and for all other purposes 18 all round would be quite adequate as age limits.

THE MADRAS ESTATES LAND (AMENDMENT) BILL, 1944.

This Bill has been introduced to get over—as mentioned in the Statement of Objects and Reasons—the effect of the ruling of the High Court in “a recent case” that unless the grant was of a whole village it will not be an ‘estate’ within the meaning of section 3 (2) (d) of the Estates Land Act. The “recent case” referred to is presumably the decision in *Ademba v. Satyadhyana Thirtha Swamivaru*¹. The same construction of the term “village” in the context of section 3 (2) (d) is also to be found in later decisions; see *Suri Reddi v. Agnihotrudu*². The proposed amendment seeking to include in the definition of “estate” grants purporting to be of a named village but actually of less than the totality of lands comprised therein, a portion of the lands of the village having been carried away under anterior grants by way of service tenures or for communal purposes or the like—will in effect rope in certain minor inams within the ambit of the term “estate”. The proposal is surely of a controversial character and might well be left over till a popular government is in power. Where the circumstances would have justified immediate legislation, as in regard to the bringing of the law of succession in relation to agricultural land among Hindus in line with the law applicable to non-agricultural property, the government has remained apathetic; but where there was no special hurry a different attitude seems to be adopted as in the case of the Tirumalai-Tirupathi Devasthanams (Amendment) Act.

The proposed Explanation (1) to section 3 (2) (d) is not couched in clear or felicitous language. It recites that where a grant as an inam is expressed to be of a named village the area which forms the subject-matter of the grant shall be deemed to be an “estate” notwithstanding “that it did not include certain lands in the village of that name which have been already granted on service tenure or been reserved for communal purposes or the like”. The expression ‘certain lands’ is likely to give rise to conflicting interpretations. Does it imply that such lands should bear only a small proportion to the total area of the village? If that view is correct, will not the further difficulty arise

1. (1943) 2 M.L.J. 289.

2. (1943) 2 M.L.J. 528.

as to what is to be considered a small proportion and what not? Or is it that even where a substantial portion of the total area has already been granted on service tenure or reserved as communal lands, the rest, if granted as an inam of a named village will become an estate within the meaning of the Estates Land Act? Again how is the expression "or the like" to be understood? It may be suggested that the words should be construed *ejusdem generis* with service tenure and communal purposes. The former may be public or private. The latter always appertains to the public generally or at any rate to a section of it. As the two enumerated objects have each a different reach what is to be the scope of the un-enumerated objects covered by the words "or the like"? An elucidation of these points is necessary if unnecessary litigation is to be avoided.

A NOTE ON ORDER 21, RULE 90, CIVIL PROCEDURE CODE.

Order 21, rule 90 of the Civil Procedure Code as amended in Madras provides that where any immovable property has been sold in execution of a decree, the decree-holder or any person whose interests are affected by the sale may apply to have the sale set aside on the ground of material irregularity or fraud in publishing or conducting it. The applicant may be called upon by the Court to furnish security for an amount equal to that mentioned in the sale warrant or that realised by the sale, whichever is less, or to deposit such amount in Court. The security so furnished or the deposit so made shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale. It is absolutely clear that the provision is intended to guard against a particular contingency only, namely, the re-sale fetching less than the original sale. If the application under Order 21, rule 90 is found to be frivolous or unsustainable it will be dismissed and the applicant mulcted in costs. If however the application succeeds then the only matter requiring protection will be the possibility of the property realising less than at the original sale. Any deficit that may result can hardly ever be as much as the amount stated in the sale warrant or realised at the auction sale. Will it not therefore suffice if the applicant is asked to give security for or deposit in Court such amount as in the opinion of the Court may be needed for the purpose in view? The rule as it stands does not seem to be correlated to the object that is sought to be secured and often operates more harshly than it is intended against the applicant. An amendment of the rule is in the circumstances to be desired.

BOOK REVIEW.

War Time Restrictions, by Krishna Kant M. Desai, published by Associated Advertisers and Printers, Ltd., Bombay, Rs. 4. (Supplement, July, 1944, Rs. 3.)

The compiler has done a painstaking job in collecting, editing and alphabetically tabulating under suitable headings all this medley of wartime legislation. Perhaps the most useful part of the book is that giving the forms which every one engaged in trade and industry has to fill for pursuing his business. The volume cannot fail to be of value to businessmen and others whose daily affairs require them to have easy and rapid access to the large body of emergency legislation. The labyrinth of emergency statutes would indeed be untraversable without the guidance afforded by the learned author who has been successful in turning the searchlight on the bewildering maze of regulations comprised in it.

Bombay Rent Restriction Act, etc., by V. K. Desai (C. G. Vora, Law Publisher, Ahmedabad), Rs. 1-8-0.

The author has collected in a handy form in this volume all the Bombay Acts relating to rent and hotel and lodging houses rates control. The Bombay Rents, Hotel Rates, Lodging House Rate Control Act of 1944 was passed by the Governor of Bombay because a Full Bench of the Bombay High Court had held Clauses (8), (9) and (12) of the Rent Restriction Control Order, 1942, previously promulgated to be invalid. The book also contains the Bombay Rent Restriction Act, 1939, passed by the Congress Ministry in Bombay just after the outbreak of the present war. The volume will be useful to landlords, tenants, hotel and lodging house proprietors and patrons.

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THE LATE LORD ATKIN.

Members of the legal profession throughout the British Commonwealth would have learnt with genuine regret of the death, on 25th June, of Lord Atkin of Aberdovey. For by every test, he was one of the greatest Judges of modern times. For sheer length of tenure, one has to go back to the days of Lord Mansfield (who was Lord Chief Justice for 32 years) to find a parallel. Lord Atkin was born in 1867 in Queensland. On his father's side he was Irish. He received his education at Oxford. He read in the chambers of the great common-law lawyer, T. E. Scrutton (afterwards Scrutton, L.J.). He had his home in Wales. Called to the Bar in 1891, he took silk in 1906, was appointed Judge of the High Court of Judicature in 1913 at the early age of 45, became Lord Justice in 1919 and was made a Lord of Appeal in Ordinary in 1928. Thus for a period of 31 years he served as a Judge. Within a very short time of his appointment he acquired a great reputation for his sure grasp of facts and mastery of the law. Sir Walter Schwabe, when Chief Justice of Madras, used to say that the opinion of no Judge was more highly valued and respected in England than that of Atkin, L.J. (as he then was). He had all the qualities necessary to make a great Judge—patience, good humour, knowledge of human nature and of the fundamental principles of jurisprudence, courage and vision. Endowed with wonderful *tour-de-force*, constructive intuition and an accurate knowledge of law, he was able to express his views freely and his conclusions were never hesitant. The reported judgments show that his reasoning was always close and sound, his analysis of facts searching, and his style luminous and in tune with the subject of discussion. His expositions could be lofty and resonant (*Liversidge's case*), felicitous and telling (*Ambard's case*) or cogent and simple (*Fender's case*). His dissenting speech in *Liversidge's case*, according to a writer in the *Harvard Law Review*, "deserves to stand with the most celebrated pronouncements for liberty which have come from common-law Judges." Lord Atkin had there observed:

"I view with apprehension the attitude of Judges who on a mere question of construction when face to face which claims involving the liberty of the subject show themselves more executive-minded than the executive . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which . . . we are now fighting, that the Judges are no respecter of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister."

Equally memorable is his pronouncement in *Ambard's case*, where, in regard to the power to punish for contempt he observed:

"The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism . . . they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

Many of Lord Atkin's judgments form lasting contributions to British jurisprudence. Amongst them may be mentioned:

*Donoghue v. Stevenson*¹ (on the liability of manufacturer to ultimate consumer), *Ras Behari Lal v. Emperor*² (on the necessity for jurors in criminal trials being conversant with the language in which evidence is taken and arguments addressed), *Ambard v. Attorney-General for Trinidad and Tobago*³ (on the law of contempt), *Fender v. St. John Mildmay*⁴ (on the scope of the doctrine of public policy), *Liversidge v. Sir John Anderson*⁵ (on the liberty of the subject) and *Debi Prasad Sharma v. Emperor*⁶ (on the liberty of press). Lord Atkin's death leaves a gap in the ranks of British Judges which it will be difficult adequately to fill.

COURT-FEES ACT—S. 5.

Section 5 of the Court-Fees Act as it at present runs, imposes great hardship upon the suitors in the High Court. The decision of the Taxing Officer is made final and even if he be patently in error, the Judge's decision cannot be invoked unless the Taxing Officer chooses to refer the matter to the Judge. One can appreciate the Taxing Officer's belief that he was right and so coming to the conclusion that there is no need to refer. But a situation may easily be imagined. The point that arises for decision may be a debatable one, raising a question of principle and hence one of general importance, since any decision thereon would set up a precedent, binding on the office and on the general litigant public. Even so, the Taxing Officer may refuse to refer because "in his opinion" the matter is not of general importance and the statute makes 'his opinion' the test of general importance and not the opinion of any other reasonable person, however reasonable such other person's opinion may be. This is a state of affairs which requires to be remedied by the amendment of the section. The following case which occurred recently illustrates the necessity.

In a suit in the Subordinate Judge's Court, the plaintiff sued for three separate declarations as against defendants 2, 3 and 4, they being alienees from the first defendant, who was the mother of the plaintiff. The plaintiff's case was that his mother the first defendant, was a limited owner and therefore the alienations were invalid beyond her lifetime. Each of the declarations was less than Rs. 10,000 in value, but the total of all the three exceeded Rs. 10,000. Under Schedule II, Article 17-A, he paid on his plaint a sum of Rs. 100 for each of the three declarations and a decree was passed ultimately in his favour. One of the three contesting defendants (defendant 2) alone appealed to the High Court concerning his own alienation which was for about Rs. 3,000 and paid a court-fee of Rs. 100, even as the plaintiff paid in the lower Court in respect of that alienation. The High Court office took the view that a court-fee of Rs. 500 was payable and on the question being referred to the Taxing Officer, he agreed with the office. For the proper ascertainment of the court-fee in such a case, it was argued for the appellant that the language of Article 17-A of Schedule II, would have to be read in the light of section 17 of the Act, but the argument did not appeal. Next, decisions in (1937) 2 M.L.J. 616 and 68 M.L.J. 280 were cited, but they were distinguished as being mere illustrations, not applications of the principle. The further argument that the particular appellant-defendant had no interest in the other declarations against the other defendants and that as a defendant, he had no choice of forum or valuation in the lower Court and that the value of his appeal memorandum alone should be taken into account, was put aside on the ground that he could not split the jurisdictional value adopted in the lower Court. The result was conceded to be a patent hardship to the suitor, for, on this line of reasoning even if the defendant's alienation was for less than Rs. 500 (say Rs. 100) he would have to pay Rs. 500 as court-fee.

In these circumstances, the Taxing Officer was requested to refer the matter to the Judge; but he declined, as "in his opinion" the matter was not one of general importance. An application under section 45 of the Specific Relief Act

1. (1932) A.C. 562.

2. (1933) 65 M.L.J. 513; L.R. 60 I.A. 354;
1 L.R. 12 Pat. 811 (P.C.).

3. (1936) A.C. 323 (P.C.).

4. (1938) A.C. 1.

5. (1942) A.C. 206.

6. (1943) 2 M.L.J. 568 (P.C.).

to the Original Side of the High Court for a mandamus directing the Taxing Officer to refer the question of the proper court-fee to the Taxation Judge, was dismissed on the ground that the Taxing Officer was the sole Judge of what is of general importance or not.

A decision on court-fee does not present circumstances like those arising under the Defence of India (or Realm Rules) where action has to be taken against an individual if his activities are prejudicial and the statute empowers the officer to take action 'if he is satisfied' that the individual's activities are prejudicial, the *raison de etre* of leaving the satisfaction to the individual officer being that he might have confidential and private information regarding the alleged prejudicial activities which may not be available or be disclosed to outsiders (see remarks of Viscount Maugham, in 1942 A.C. 206, 221). But on a question of court-fee, no such considerations operate. What is of general importance is a matter of objective test and capable of an outside answer. There is no special reason for making it purely subjective of the Taxation Officer. Here is a case, one of construction of a statute, bereft of any previous authority, and the decision on which establishes a precedent; also, the particular construction adopted, leads to great hardship. If such a question is not one of general importance, one may query, what else would be; but nevertheless, if the Taxing Officer, should, however arbitrarily, take the view that the question is not of general importance, his word, even in respect of what is of general importance, is final. One can understand his opinion on the merits being final; but to leave the question of what is of general importance of not, equally final with the Taxing Officer's word, is to invest an uncalled for power in the Taxing Officer. And most often, human nature being what it is, an officer concerned has a tendency to confuse the decision of the question of general importance with the decision, of the question on the merits. In *Alcock, Ashdown's case*,¹ the Income-tax Officer refused to refer a question to the High Court, because in his opinion, 'the law was quite clear on the point,' and it was left to the Privy Council to point out that that circumstance was irrelevant, and his duty was to refer, when the reference raised a question of law. But that was under sec. 51 of the Income-tax Act of 1918 in which the language was "if in the course of any assessment under this Act. . . a question of law arises, the Commissioner may refer it to the High Court." It is at least desirable that the language of section 5 of the Court-Fees Act should be drawn up on similar lines, instead of making the Taxing Officer supreme Judge of, not only the correctness of his view on the merits, but also of what is of general importance. If the question arose before the lower Courts, the High Court Judge's opinion may be invoked in appeal or revision, but if the same question arose in the High Court office, the Judge cannot be approached. This is an anomaly requiring the attention of the Legislature.

A. C. SAMPATH IYENGAR.

BOOK REVIEW.

VYAVAHARA NIRNAYA OF VARADARAJA. Published by the Adyar Library.

Professor Rao Bahadur K. V. Rangaswami Iyengar and the Adyar Library have laid us all under an obligation by the printing and publication of the Vyavahara Nirnaya of Varadaraja, also known as Varadarajiya. It is a neatly printed and well-edited book with a foreword by Sir P. S. Sivaswami Aiyar and a valuable introduction by Prof. K. V. Rangaswami Iyengar. As all Hindu lawyers are aware, a manuscript of the Vyavahara Nirnaya of Varadaraja in the Tanjore Palace Library attracted the notice of Dr. A. C. Burnell, when he was District Judge of Tanjore and he recognised its merit and translated it into English and published the chapter on Inheritance and Partition, as early as 1872. The Judicial Committee, in its judgment in *Buddhi Singh v. Lattu Singh*, L.R. 42 I.A. 208, discussing the question whether according to the Mitakshara law of the Benares School, the grandson of the great-grandfather of the propositus should be preferred to the great grandson of his grandfather relies on the authority of this work and observes at p. 222 as follows: "Varadaraja, whose authority is said to be great in Southern India and whose enunciations appear to be received with respect also by the expounders of the Benares School, has given expression to the same view" By the words "same view" their Lordships meant that "in the father's line, on failure of the brother's son, the brother's son's son is heir." At p. 457 of the present edition, Varadaraja's view is to be found briefly and without any discussion thus:
 ब्रातृपुत्राणामभावे तत्पुत्राः धनभाजः ॥

1. (1929) 45 M.L.J. 592; L.R. 50 I.A. 227; I.L.R. 47 Bom. 742 (P.C.).

It is clear that the Vyavahara Nirnaya of Varadaraja which belongs to the class of Nibandhas or Digests of Hindu Law is a work of great authority and ranks equal in importance with the three other great South Indian Digests, the Vyavahara-Madhaviya, the Smṛithi Chandrika and Sarasvati Vilasa. But Prof. K. V. Rangaswami Iyengar says, "while there were at least two editions of each of these three South Indian Digests, there was not even one in any script, of Varadaraja's Vyavahara Nirnaya." Hence we are glad he has now supplied a long-felt want. In the earlier days of the British administration of Hindu Law, reliance was placed largely on translations of Hindu Law Books. But the presence of Indian Judges and lawyers with acquaintance of the language of the original sources in our country has brought to prominence the necessity and usefulness of critical editions of the original texts themselves. Prof. Rangaswami Iyengar has, therefore, done a notable service to the cause of the study and administration of Hindu Law by the publication of this work. This work, evidently, forms part of a bigger treatise and the Vyavahara portion alone is found in the existing manuscripts. Prof. Rangaswami Iyengar rightly infers this from the absence of the mangala sloka either in the beginning or the end of the book and the manner of reference to Varadaraja by Katavyavahara in his commentary on Kalidasa's Vikramorvasiya. It seems to be highly probable that, like the other nibandha-writers, Varadaraja wrote chapters on other subjects like *achara*, *asoucha*, etc.

Hitherto, scholars and Hindu Law writers thought, that Varadaraja was a modern writer and belonged to the 17th or 18th century. Prof. Kane in his History of Dharmasastras takes the view that the book was composed about 1500 A.D. But Prof. K. V. Rangaswami Iyengar argues with great force that the work belongs to the period during which Vedanta Desika lived, more approximately about 1250 A.D. He concludes that Varadaraja was earlier than the Madhaviya and close to the date now accepted for the Smṛithi Chandrika. So far as Hindu lawyers are concerned, it is sufficient to observe that the publication of a carefully edited text of the Vyavahara Nirnaya by a scholar of eminence as Prof. K. V. Rangaswami Iyengar is a great help to them in the interpretation and application of the Mitakshara law in the decision of cases.

THE CZECHOSLOVAK CAUSE, by E. Taborsky, published by H. F. & G. Witherby, Ltd., London, 1944, 158 pages. 12/6 net.

No state in modern times has earned and held the esteem of civilised nations more than Czechoslovakia. Masaryk the founder and Benes his collaborator in the task had through their singleminded efforts won for it a place as an independent state at the conclusion of the last war. The mode in which the country was governed, the way in which its minority problems had been tackled, the rapid strides in industrial rehabilitation that had been made and the achievement of genuine freedom by its citizens in actual practice had made Czechoslovakia a pattern and an exemplar. But alas! within two decades of the foundation of the republic, Hitler fired by his ambition for a "greater Reich" had decided that it shall cease to exist. The Munich Agreement of September 29 1938—one of the most humiliating episodes in the history of nations—marking a policy of "appeasement" and readjustment by "peaceful change" of territorial frontiers imposed by four great powers against the will of a fifth power which was mutilated and in contravention of the obligations which they had undertaken as members of the League of Nations, was the beginning of the end. Within six months thereof Czechoslovakia had been practically absorbed into the Reich. This book gives an account of the history of the country from 1938 until the present time as an independent member of the family of nations, and in doing so it deals with some of the most interesting and complicated problems of international law. How in the sacrifice of Czechoslovakia the leading world powers facilitated the violation of international engagements and rules of law, how despite its absorption by the Reich the Czechoslovakian state survived in the strict juridical sense of the term, how the Munich Pact now stands retrospectively annulled are all brought out clearly. The non-validity of territorial cessions or of the union or annexation of an independent state as a protectorate without the approval of its national representatives, the lapse of treaties consequent upon one of the signatories failing to carry out its part of the bargain, the question how the legislative, executive and judiciary powers organised by the constitution of the country can function far away from the national territory, its Government being in exile, and the value of the actions so taken both with regard to the sovereignty of the territory which has afforded refuge and also with regard to the Czechs scattered abroad—problems of great interest and nicety in international law—are studied in the present work with great care and with reference to the available authorities at every stage. The ruling of the British High Court in *Re Amand (II)*, (1942) All.E.R. 236, that the principle which prevents a Court pronouncing to be invalid some act which may nevertheless be invalid by the law of the state which made it does not apply to an act of a foreign state which deals with the personal freedom of a person living in England within the protection of the Crown, comes in for forceful criticism as not being in accord with the principles of international law. Whether one may or may not agree with all the conclusions drawn by the author one will have no hesitation to admit that the topics are discussed with considerable clarity and balanced presentation.

The book is of absorbing interest throughout. The problems dealt with are the concern not merely of the politician and the lawyer but also of laymen who study international relationships. Every one will heartily endorse the words of Prof. Rene Cassin, in the Preface: "When historians are able to pass judgment on this first half of the twentieth century, in the course of which a thirty years' war divided by a simple armistice will be seen to have revolutionised the world, they will be able to say that Czechoslovak democracy has remained in prosperity as well as in trials, heroically faithful to its ideals, worthy of its re-constitutors, worthy in fine to occupy for all time the place among the free nations which it won at such great cost".

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ACCUSED'S RIGHT TO BE HEARD.

The pronouncement of Viscount Maugham in *Galos Hiral v. The King*¹ is noteworthy both in regard to the right of an accused to be heard and also for its elucidation of the scope of the criminal jurisdiction exercised by the Privy Council. The Judicial Committee is not a revising court of criminal appeal. Appeals to it lie by special leave only. Applications for such leave are many every year: leave is granted however only sparingly. "Infringement of the essential principles of justice" would alone justify the grant of leave. Though couched in varying language by different law lords, the principle has always been the same. In *Mohinder Singh v. The King-Emperor*², Viscount Dunedin stated it to mean that "there must be something so irregular or so outrageous as to shock the very basis of justice." In *Easwaramurthy Goundan v. King-Emperor*³, Lord Wright explained the principle as signifying that there should be "a miscarriage of justice." The scope of the principle was to some extent explained in *In re Abraham Mallory Dillet*⁴, where Lord Watson observed: "The rule has been repeatedly laid down and has been invariably followed, that Her Majesty will not review, or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done." Applying the principle, the Privy Council ruled in *Mohinder Singh's case*² that the meaning and effect of a section of the Evidence Act will be a matter for the court of appeal in India and not for their Lordships. Viscount Simon, L.C., has dealt with the scope of the expression "infringement of the essential principles of justice" exhaustively in *Muhammad Nawaz v. Emperor*⁵ with a view to "re-state in unmistakable terms, the limits of the jurisdiction exercised in criminal appeals by the Judicial Committee." The Lord Chancellor said: "The Judicial Committee is not prepared or required to re-try a criminal case, and does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence or with questions as to corroboration or contradiction of testimony, or as to whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross-examination as a hostile witness or in awarding particular punishments." To afford "assistance to counsel," his Lordship proceeded "to give illustrations by way of contrast, of what are the limited but very important grounds on which a petition (for special leave) in a criminal case may properly be presented." He said: "An obvious example would be a conviction following a trial, where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses. Similarly, of course, if

1. (1944) 2 M.L.J. 252 (P.C.).

2. (1932) 64 M.L.J. 77: L.R. 59 I.A. 233: I.L.R. 13 Lah. 479 (P.C.).

3. (1944) 1 M.L.J. 515.

4. (1887) 12 A.C. 459.

5. (1942) 1 M.L.J. 5 (P.C.).

the tribunal was shown to have been corrupt, or not properly constituted, or incapable of understanding the proceedings because of the language in which the proceedings were conducted. Another obvious example would arise if the Court had no jurisdiction either to try the crime, or to pass the sentence."

Galos Hired's case constitutes a nice and interesting variation of the first of the illustrations given by Viscount Simon. There was no refusal to hear the case of the accused nor any hearing of it in his absence. The accused in fact was heard personally. Under section 3 of the Somaliland Poor Persons Defence Ordinance (No. 26 of 1939) the accused had a right to have a counsel engaged for him by government. A counsel from Aden was so engaged in fact. He, however, was unable to be present in court on the day fixed for hearing the appeal for no fault of his own. His arrival was delayed due to non-availability of transport to carry him from Aden to Somaliland. The court, however, without adjourning the case proceeded to hear the accused personally and confirmed the sentence of death which had been passed by the trial court. In those circumstances, Viscount Maugham held, on an appeal by special leave to the Privy Council, that "just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so . . . an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government, who was unable without any default on his part to reach the court in time to conduct the appeal."

A PRAISEWORTHY ACT.

It was announced in the Papers recently that a leading legal practitioner in the City had offered to donate a sum of several lakhs of rupees for establishing a first grade college for women in Egmore. It subsequently transpired that the donor was Mr. V. L. Ethiraj. In England, donations on a large scale for promoting various objects of public benefit are not uncommon. In India, and particularly in the south, only a few can afford to give, lead in this direction. It is therefore most gratifying that a member of the Bar should have set an inspiring example and made a donation without any ostentation. The object of the donation is laudable; the amount munificent. Acquisition of wealth gains special flavour if applied for philanthropic purposes. Mr. Ethiraj's example is one of which the Bar may well feel proud.

JOTTINGS AND CUTTINGS.

New Judicial Appointments.—Members of the "lower branch" of the legal profession were gratified to learn of the appointment of Mr. George Justin Lynskey, K.C., to be a Justice of the King's Bench Division of the High Court. For ten years, from 1910 to 1920, he was himself a solicitor. Liverpool has particular cause for rejoicing, for it was there that his father practised as a solicitor for many years. Before his admission to the roll of solicitors the present Judge took his LL.B. and LL.M. degrees at Liverpool University. In 1930 he took silk; in 1937 he became Judge of the Salford Hundred Court; and in 1938 he became a Bencher of his own Inn, Middle Temple. Of an invariably genial demeanour to all, Mr. Justice Lynskey has endeared himself while at the Bar to his brother barristers, and more particularly to the members of the Northern Circuit, of which he was leader. It would be superfluous to praise the erudition and legal acumen of Lord Justice Goddard, who has been appointed to succeed Lord Atkin as a Lord of Appeal in Ordinary. His was almost an obvious appointment. From 1932 to 1938 he was a Judge of the High Court, and from 1938 to 1944 he was a Lord Justice of the Court of Appeal. Equally, the appointment of Mr. Justice Lawrence to the Court of Appeal has been generally approved. The conspicuous ability with which he has tried cases as a revenue judge is a sufficient indication of his powers. Those who have seen him administer the law cannot fail to be impressed with his quiet charm, with its hint of great intellectual reserves.—S. J., 1944, page 257.

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NOTES OF INDIAN CASES.

BHABATARINI DEBI v. ASHALATA DEBI, (1943) 2 M.L.J. 70 : L.R. 70 I.A. 57 : I.L.R. (1943) 2 Cal. 137 (P.C.).

"Abstract reasoning is never without its perils in matters of first impression. Before the results can be accepted a careful regard must be had to practical consequences and to competing analogies or principles." So said the Privy Council in the above case which was a suit by the founder's heir for declaration of right to and possession of the properties of a *sebaiti* as against the heirs of the specific nominee who had held the office, on his death. The case constitutes a valuable exposition on two points, namely, (1) is *sebaiti* an office or property or both? and (2) how does it devolve?

In regard to succession, it has been generally stated in *Gossami Sri Giridharji v. Romanlalji Gossami*¹: "According to Hindu law when the worship of a thakur has been founded the *sebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution." The position so set out by Lord Hobhouse was re-stated by Sir Arthur Wilson in *Jagadindra Nath Roy v. Hemanta Kumari Debi*², in the form "that the title to the property or to the management and control of the property, as the case may be, follows the line of inheritance from the founder."

Three possibilities emerge: (i) There may be no disposition of the *sebaitship* by the founder, in which case, it like any other heritable property remains in the line of the founder and each succeeding *sebait* succeeds to the rights by virtue of his being an heir to his immediate predecessor and not to the original grantor; (ii) the *sebaitship* may be disposed of completely and absolutely in favour of another person, in which case there remains nothing in the grantor except possibly a right of reversion on failure or extinction of the line of *sebait*s indicated by him; (iii) the *sebaitship* may have been parted with only partially for the lifetime of the grantee, as where the founder has made a grant to X or to X and Y in succession of the office of *sebait*, without intending or at least without effectively directing that the heirs of either are to take. Excepting for one case no decision had in the past dealt with the exact method of determining the individual person or persons who should be the first takers after those specifically nominated to the office by the founder. In *Kunjamani Dasi v. Nikunja Behari Das*³, the founder had left a widow and six sons: he had nominated the widow and two sons to be successively *sebait*s: there were no further directions. It was held by Mookerjee and Richardson, JJ., that on the death of the last of the nominated persons, the next takers would be "the heirs of the founder at the time," rejecting the contention that on the death of the founder all his sons

* 1. (1889) L.R. 16 I.A. 137 (144) : I.L.R. 17 Cal. 3 (P.C.). 32 Cal. 129 (P.C.).
2. (1904) L.R. 31 I. A. 203 (208) : I.L.R. 3. (1916) 20 C.W.N. 314.

took a vested interest subject to the right of the nominated persons: Mookerjee, J., observed: "The entire office is vested in him, though his powers of alienation are qualified and restricted . . . The position of a *sebait* is analogous to that of a Hindu female in possession of the estate of the last full owner rather than to that of the holder of a life estate. When a Hindu female is thus in possession she represents the estate completely and though her powers of disposition may be of a restricted character, no one else has a vested interest in the estate during her lifetime. Similarly, when a founder has given valid directions as to the devolution of the *sebaiship* . . . the office vests in persons who at the time constitute the heirs of the founder, provided the last *sebait* has not taken it absolutely." In other words, the principle is postulated that *sebaithi* is an office and the necessity of treating the *sebait* in office as completely representing the idol and its property precludes the recognition of any other person as having a vested interest in the remainder and therefore prevents any interest in the *sebaithi* being carried along "the straight line of inheritance from the founder" during the time the office is held by one to whom the founder has granted the *sebaithi* but not absolutely so as to devolve upon his heirs.

In the case under notice the Privy Council rejects this line of reasoning as fallacious. According to their Lordships *sebaithi* is not an office merely; the *sebaithi* right involves both the elements, "office" and "property" and neither element is to be discarded. They point out that the decisions in *Manohar Mukherjee v. Bhupendranath Mukherjee*¹ and *Ganesh Chunder v. Lal Behary*² have emphasised the proprietary element in the *sebaithi* right and that the ruling in *Gnanasambanda v. Velu*³ has stated that the *sebaithi* is heritable property and not a mere catena of life estates. Their Lordships further remark that the idea that there can be no residuary right in anybody so long as a *sebait* is actually in office can be supported only on the principle that *sebaithi* is an office pure and simple and not a property, a position which according to them is untenable. The analogy of the Hindu widow's estate invoked in *Kunjamani's case*⁴ is shown to be misleading. The widow represents her husband's estate in the sense that she is the owner of it; in the case of the *sebait* though he has some beneficial interest in the debutter property, it is the idol that is the owner. Again the widow's powers of disposition are limited because she is not a stock of descent and has a duty to protect the reversion; in the case of the *sebait* the limit set to his power of disposition is set not to preserve the interest of the next *sebait* but to maintain and preserve by proper management the endowment or religious institution. Notwithstanding therefore that the *sebait* completely represents the idol even as a widow completely represents her husband's estate, it cannot follow that while the *sebaithi* is held by a person nothing save a *spes successionis* in regard to it can be attributed to any one else. It is indisputable that if the founder had made no nomination to the *sebaiship* it would have devolved in the line of the founder in like manner as property inherited from a male owner who had held it in severalty and the next heir if a male would become a stock of descent. Where there is a disposition of the *sebaithi*, but not completely and absolutely, the grant can only disable the founder and any heir of his from having or asserting during the donee's life any right to represent the idol or manage its affairs or from impairing in any manner the right of the *sebaithi*. In regard to the devolution of the office, also it will follow that the course of devolution prescribed by the ordinary law should give way only so far as is necessary to let in the persons nominated by the founder and no further. Thus the residue left with the founder in regard to the *sebaithi* right, which is not a mere *spes successionis* but a vested right, will continue to devolve like any other property of the founder on his death and the next heir if a male would be a fresh stock of descent.

In *Manathunainatha Desikar v. Gopala Chettiar*⁵, while recognizing that it is settled law that the *sebaithi* office equally with the hereditary office of manager of a South

1. (1932) I.L.R. 60 Cal. 452 (F.B.).

2. (1936) 71 M.L.J. 740 : L.R. 63 I.A. 448 (P.C.).

3. (1899) 10 M.L.J. 29 : L.R. 27 I.A. 69 (78):

I.L.R. 23 Mad. 271 (P.C.).

4. (1916) 20 C.W.N. 314.

5. (1943) 1 M.L.J. 434.

Indian temple is a species of property to which the restrictions enunciated in the *Tagore case*¹, are applicable, the learned Judges remark that the position of a *sebit* is essentially different from that of a dharmakarta or manager of a public temple in this part of the country, for, unlike the *sebit* the manager has no beneficial interest whatever in the endowments and is merely the holder of an honorary office and that where the trust is a public trust, and the office is non-hereditary, not carrying with it any interest in the endowment, "it is impossible to maintain in the absence of definite authority that the office is property in any sense of the term." It may at once be stated that in *Srinivasachariar v. Evalappa Mudaliar*², the Privy Council itself has recognized that *sebiti* is essentially different from that of a manager or dharmakarta of a temple. Their Lordships point out that the term 'dharmakarta' "is in truth the legal equipollent to trustee. The position of dharmakarta is not that of a *sebit* of a religious institution or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character. . . . A dharmakarta is literally and no more the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee." On the question whether it makes any difference if the trust is a public and not a private trust the Full Bench of the Calcutta High Court in *Manohar Mukherjee v. Bhupendranath Mukherjee*³ refused to draw a distinction between public and private trusts in deciding whether the *sebiti* office is property or not. There is nothing in the instant decision either countenancing or repelling such a distinction. The Privy Council, however, expressly adverts to the *sebit* having a beneficial interest in the endowed property. It may therefore be that a non-hereditary office like that of the dharmakarta carrying no beneficial interest in the properties of the institution does not fall within the purview of the instant decision and cannot be deemed to be property. Anyway a clarification of that question by the Judicial Committee will be awaited with interest.

KRISHNAPPA v. VENKATAPPA, (1943) 2 M.L.J. 108.

Seventy years and more have elapsed since the Indian Evidence Act came into force; yet, the applicability of the presumption contained in section 112 to Hindus, who regard marriage as a *samskara*, seems to have come up directly for consideration for the first time in the above case, though decisions are not wanting where such applicability has either been assumed or been the subject of *ipse dixit*. Section 112 states: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The question whether the provisions of section 112 control or stand controlled by the provisions of Muhammadan law regarding gestation and legitimacy has come up before the Courts fairly early. As pointed out in *Ashrufood Dowlah v. Hyder Hossein Khan*⁴, the Muhammadan law requires as a condition of legitimacy that conception should have commenced after marriage; a child conceived before marriage is therefore not legitimate under that law. Under section 112 however it is enough to establish legitimacy that the birth took place during the continuance of the marriage although the conception may have taken place before the marriage. In *Muhammad Allahdad v. Muhammad Ismail*⁵, it was observed that it was doubtful by which of these two rules the question of legitimacy is to be determined. Text writers also have manifested a cleavage of opinion. While Mr. Field in his book on Evidence propounded the view that section 112 supersedes the rules of Muhammadan

1. (1872) 9 Beng.L.R. 377 (P.C.).
2. (1922) 43 M.L.J. 536 : L.R. 49 I.A. 237 :
I.L.R. 45 Mad. 565 (P.C.).

3. (1932) I.L.R. 60 Cal. 452 (F.B.).
4. (1866) 11 M.I.A. 94 (P.C.).
5. (1888) I.L.R. 10 All. 289 (339).

law, Sir Roland Wilson taking a contrary view in his book on Anglo-Muhammadan Law remarked that the rule of the Evidence Act is really a rule of substantive marriage law rather than of evidence and as such has no application to Muhammadans so far as it conflicts with the principles of Muhammadan law. Sir Dinshaw Mulla has in his Principles of Mahomedan Law agreed with the opinion of Mr. Field on the ground that whether the rule laid down in section 112 of the Evidence Act is a rule of substantive law or of evidence the fact stands that the rule finds its place in an enactment which applies to all classes of persons in British India. That section 112 controls the rules of Muhammadan law seems now to be generally accepted; see *Mt. Hazira Khatun v. Mt. Amina Khatun*¹, *Sibt Muhammad v. Muhammad Hameed*², *Mt. Rahim Bibi v. Chiragh Din*³, etc. In *Muhammad, Sheriff Beg v. Abdul Hail Beg*⁴, it was pointedly stated that the fact that the parties are governed by the Muhammadan law makes no difference so far as the application or effect of the presumption under section 112 is concerned and that the principles of that law cannot override section 112.

• • Is a different conclusion impelled in the case of Hindus? According to the Shastras marriage is a *samskara*. The bride should be a virgin (अनन्यपूर्विका).

Once only is a maiden given in marriage. Marriage is therefore indissoluble. Section 112 in terms refers to dissolution and remarriage. Can it be that this factor is a pointer that Hindu marriages will remain outside its scope or is the section to be understood as providing for all cases—cases where marriage is indissoluble as also cases where dissolution is permitted? Anglo-Hindu law has come to regard the requisites laid down by the Shastras, as pertaining to an ideal marriage only. It has permitted relaxations both in regard to the rules of selection of bride and bridegroom and ceremonies on the one hand and in regard to the indissolubility of the union on the other, partly by treating some of the rules as advisory only and not mandatory in character and partly on the ground of custom. Under the Hindu system of law clear proof of usage can outweigh the written text of the law. In *Mondan Shetti v. Timmi Avva*⁵, it was held that pregnancy of the bride at the time of the marriage does not invalidate the marriage. In *Sankaralingam v. Subban*⁶, it was stated that a right of divorce will be recognised by the Courts if a custom permitting it in the case of any community is proved. In *Collector of Trichinopoly v. Lekkamani*⁷, the Judicial Committee considered that among Hindus a child conceived before but born during the continuance of a valid marriage is legitimate and that Hindu law is the same as English law on this matter. It is this principle, namely, that it is birth during marriage that alone is relevant for the status of legitimacy, that is embodied in section 112. The observation of the Judicial Committee in *Bhagwan Baksh Singh v. Mahesh Baksh Singh*⁸, that “as the plaintiff was admittedly born after his mother’s marriage to Chatarpal, the onus of establishing the defences lies heavily on the defendants under section 112 of the Indian Evidence Act” is implicit with that assumption. The parties there were Hindus and the applicability of section 112 was not disputed; see also *Misir Bhairon Prasad v. Mussamat Gopi*⁹ and *Karapaya Servai v. Mayandi*¹⁰. In the latter case it was observed: “It is common ground that the case is governed by section 112 of the Indian Evidence Act.” In *Sethu v. Thirumeni Thevan*¹¹, it was pointedly argued “that according to Hindu law, there are only two classes of sons, *aurasa* and *dattaka* sons, and to import section 112 into the region of Hindu law would be giving section 112 the force of substantive law over-riding the principles of Hindu law.” Pointing out that the very applicability of the shastraic Hindu law to communities like the one concerned in the particular case was somewhat questionable, the learned Judges refer to the fact that in the

1. A.I.R. 1923 All. 570.

2. (1926) I.L.R. 48 All. 625.

3. A.I.R. 1930 Lah. 97.

4. (1937) M.W.N. 957.

5. (1939) 2 M.L.J. 882.

6. (1894) I.L.R. 17 Mad. 479.

7. (1874) L.R. 1 I.A. 282 (P.C.).

8. (1935) 69 M.L.J. 868 (P.C.).

9. (1930) 58 M.L.J. 708 (P.C.).

10. (1933) 66 M.L.J. 288 : I.L.R. 12 Rang. 243 (P.C.).

11. (1926) 50 M.L.J. 453 : I.L.R. 49 Mad. 553.

case before them the custom of the caste permitted divorces and re-marriages, so much so it would be incongruous to regard the marriage as conforming to the shastraic marriage; with the result, that the very basis of the argument seeking to exclude the applicability of section 112 was wanting. The learned Judges observed that even if it was a marriage in accordance with the shastras, still support for their conclusion was afforded by the text of Manu (IX, 173) which recognises that if one marries a pregnant young woman, whether pregnancy be known or unknown, the child in the womb belongs to the bridegroom, the argument being that a legitimate son need not have been conceived in wedlock and that even under the shastras it is only birth during the subsistence of a marriage that is needed for conferment of legitimacy. One may pause to remark that the text deals only with filiation and affords no warrant for treating the child as a legitimate child. Be that as it may, in view of the fact that *prima facie* the principles of the Evidence Act are applicable to all classes in British India; that there is a catena of decisions assuming the applicability of the provisions of section 112 to Hindus; that under Hindu law as administered by the Courts the shastraic marriage is regarded as an ideal marriage only and custom is permitted to over-ride the scriptural precepts affording countenance to divorce on that footing, it looks as if it is too late in the day to contend that the presumption enacted in section 112 cannot apply to Hindus.

ROSAMMA v. CHENCHIA, (1943) 2 M. L. J. 172; SATYANARAYANACHARLU v. NARASAMMA, (1943) 2 M.L.J. 282.

The Hindu Women's Rights to Property Act continues to be a fruitful field for litigation and furnish problems on which not always are consistent judicial dicta to be found. Regarding the status of a widow who becomes entitled to the interest in joint family property which her deceased husband had, in the first of the above cases, it was observed: "There is . . . nothing whatever in the Act (Hindu Women's Rights to Property Act) which suggests, that a Hindu widow does not acquire the status of a coparcener. That she may not acquire the full rights of a coparcener is no doubt clear, because these rights are limited to the words of the Act—a Hindu widow's estate—but that she acquires full status for the purpose of filing a suit (suit for partition) I have no doubt." The contrast drawn is between *status* and *rights*. In a coparcenary, in regard to rights, as for instance, with reference to the quantum of interest taken by sharers, even where they may be of the same generation or rank, it is clear that there can be disparity or inequality among them (*e.g.*, adopted son and after-born *aurasa* son; sons' sons; legitimate son and illegitimate son among Sudras). Yet they all have an equal status. They may all be coparceners in regard to the availability of the right of survivorship or in regard to the liability of their interests for debts incurred for legitimate purposes of the family. Nor will it militate against a person becoming a coparcener with one for the first time on the death of another, that the deceased and such other person had been coparceners all along while the new entrant was not in such legal relationship with the deceased. There can therefore be nothing incongruous or repugnant to prevailing legal ideas if a widow who becomes entitled to her deceased husband's interest in joint family properties acquires the status of a coparcener. The question however is whether the provisions of the Hindu Women's Rights to Property Act lead to such a result. While the first of the decisions under notice, favours such an inference the other case seems to suggest a somewhat different conclusion. It is there stated: "The effect of the death of a coparcener . . . is that the widow stands in the shoes of her deceased husband and that although she is not a coparcener she has the rights of her husband who was a coparcener." This definition of the widow's position fell to be made apropos of the sufficiency of representation by the karta of the joint family in suits for recovery of sums due to the family. In another connection, namely, with reference to the question whether it will be open to a creditor of the deceased husband to proceed against the latter's interest in the joint family properties to which the widow had become entitled on his death, for realisation of the amount due to him, in *Saradambal*

v. *Subbarama Aiyar*¹, it was declared : " Giving the language [section 3 (2)] its plain meaning, the widow takes that interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by clause (3) of the Act. . . Taking both the clauses together the property taken by her is liable for the debts of her husband . . . Though the interest she takes is the limited interest of a Hindu woman, she is conferred the same status as that of a male owner." The latter part of the observation suggests that though the widow takes under the statute her status will be that of a coparcener. In *Kallian Rai v. Kashi Nath*² yet another approach is found in regard to the widow's status. It is there pointed out that the Hindu Women's Rights to Property Act does not effect a statutory severance or disruption of the joint family and that as long as the widow does not call for a partition the status of the joint family continues and that though she may not be a coparcener, it cannot be said that she is not a member of the joint family. This would suggest that as she does not become a coparcener she cannot have the benefit of survivorship should any coparcener die after her becoming entitled to her husband's interest. The ruling in *Natarajan Chettiar v. Perumal Ammal*³ is categorical that the widow " was not a coparcener before her husband's death and she was not one afterwards."

It will be seen, that a precise evaluation of the widow's status is necessary for various purposes, such as for deciding (i) whether she can have the benefit of survivorship, (ii) whether she can herself become the karta of the family, (iii) whether her interest will be available to a creditor of the husband to proceed against, (iv) whether she will have to take out a succession certificate for instance to realise a debt standing in the name of her husband and taken by her along with her son, (v) whether she will have to be treated as a person out of possession of the family properties when she brings a suit for partition, for purposes of assessing court-fee, etc. The decisions disclose three different views as regards her status : (i) she has the status of a coparcener [(1943) 2 M.L.J. 172 ; (1941) 2 M.L.J. 862] ; (ii) she has not the status of a coparcener [(1942) 2 M.L.J. 668 ; 1943 A.L.W. 210] ; and (iii) she takes neither by survivorship nor by heirship but under the Act ; her status is that of a member of the joint family being a survival of the husband's person giving her the right to call for partition [(1942) 2 M.L.J. 668 ; (1943) 2 M.L.J. 282].

Section 3 (2) of the Act states that the widow " shall subject to the provisions of sub-section 3 have in the property the same interest as he himself had." Section 3 (3) adds that " any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner." The former clause gives the widow the same interest as her husband had, which can only be that which he had *vis à vis* the other coparceners. As such that interest could carry with it, participation in the enjoyment of the family property, right to claim partition at will, benefit of survivorship during jointness and liability for binding debts of the family. The interest could not have any advertence to or be affected by such liabilities as for instance, arising in respect of debts incurred by him for his own purposes which in his son's hands would still render that interest available for the creditor to proceed against by reason of the pious obligation doctrine. Also the Act was passed for benefiting the widow and not for enlarging the rights of creditors. As pointed out in (1942) 2 M.L.J. (N.I.C.) p. 5, the view taken in *Saradambal v. Subbarama Aiyar*¹, that it will be competent to a creditor of the husband to proceed against the interest devolving on the widow is not altogether acceptable. Section 3 (2) should really be understood as meaning that, when the widow takes, she takes the interest with the right to participate in the enjoyment of the family property and with the right to call for partition. One right which her husband could have exercised, namely, to alienate his interest, is in terms denied to her.

1. (1941) 2 M.L.J. 862 : I.L.R. (1942) Mad. 630.

2. (1943) A.L.W. 210.
3. (1942) 2 M.L.J. 668.

Lest it might be argued that partition is also a form of alienation and as such she could not ask for partition, it is expressly provided by way of a proviso to clause (3) that she shall have the same right of claiming partition as a male owner. If the view presented above is sound, it will follow that the interest devolving on the widow will remain liable only for debts and charges that would bind the family as a whole. Thus on partition the share will fall to be computed only after making provision for payment of the binding debts, the maintenance and marriage expenses payable to dependent female members of the family, etc.; see *Sarojini Devi v. Sri Kistna Anjaneya Subramariam*¹.

GOVINDA REDDI v. RAMI REDDI, (1943) 2 M.L.J. 195.

This is an important decision under the Debt Conciliation Act. Section 10 (1) enacts that where there is an application preferred to the Debt Conciliation Board for settlement of a person's debts, if after examining the debtor the board deems it desirable to effect a settlement between him and his creditors, a notice shall be issued and served calling upon the creditors to submit a statement of the debts owed to such creditor by the debtor. Clause (2) of the section provides that subject to the provisions of clause (3) "every debt of which a statement is not submitted to the board in compliance with the provisions of sub-section (1) shall be deemed for all purposes and for all occasions to have been duly discharged". The provision is penal and has naturally to be strictly construed. Section 2 (f) states that 'debt' means all liabilities owing to a creditor, secured or unsecured. *Prima facie* a secured debt also will be within the purview of section 10 (2) and no immunity from the penal consequence thereunder can be pleaded merely on the ground that the debt is a secured debt. Nor will the provision in section 14 that where a secured creditor does not agree to the settlement, it shall not affect his right to proceed against the secured property, relieve him from the consequences of his failure to file the statement required under section 10 (1). Section 14 deals with a stage subsequent to that contemplated in section 10 and cannot affect the construction of the latter section. Section 10 (2) is imperative in its language. The decisions in *Siddappa Chettiar*, In re² and *Ramalinga Chetty v. Petha Goundan*³, afford ample support to the view that on failure by a creditor (even if he is a secured creditor) to file a statement as required by section 10 (1) the Debt Conciliation Board has power to pass an order that the debt shall be deemed to be discharged under section 10 (2).

Does the fact that the debtor, in his application to the board, has admitted the debt make any difference in regard to this matter? In the case under notice which concerned a secured creditor, it is stated: "It is admitted that the appellant received notice calling upon him to submit a statement of debts and that he did not submit the required statement. It is however argued. . . . that the debt in this case should not have been deemed to be discharged (1) because it was a debt admitted by the respondent debtor and (2) because it was a secured debt. . . . Neither of these submissions, in my opinion, has any substance. *The fact that in this case the debtor admitted the debt has nothing to do with the question.* Even if the debt was admitted there was still the question of whether a settlement should be made in respect of it; and section 10 (2) was enacted, it seems clear, to secure diligence on the part of the creditor and to prevent him by dilatory tactics from avoiding an adjudication by the board on the question of the settlement of the debts." With great respect, it is submitted that this view is not warranted. Where the debt has been admitted by the debtor, why should the failure of the creditor to file a statement have the effect of discharging that debt? The statement from the creditor is required only for enabling the board to have information on which it can consider the desirability of effecting a settlement, etc. The necessary information is already before it, if the debtor has admitted the debt in his application to the board. There is thus no policy of the law frustrated nor difficulty to be experienced by the board

1. (1944) 1 M.L.J. 361.

2. (1942) 2 M.L.J. 616.

3. (1943) 1 M.L.J. 275.

by reason of the creditor's failure to file the statement. Will it not in the circumstances be intelligible to construe section 10 as meaning that the creditor will be held to what has been admitted by the debtor and cannot go behind the figures for purposes of the board effecting a settlement? This view receives countenance from the decision in *Veeraraghava Rao v. Debt Conciliation Board, Bezwada*¹, a bench decision, which however does not seem to have been noticed in the case under review. There it was observed: "Recalcitrant creditors are not deserving of sympathy but it is difficult to see why a Debt Conciliation Board should be given the power to cancel a debt which the debtor himself admits to be due simply because the creditor has not filed a statement confirming the particulars set out in the debtor's application. I can well understand that when a creditor fails to file a statement under section 10 (1) he should be precluded from disputing the debtor's figures but there can be no justification for depriving him of what the debtor has acknowledged to be due to him." The orders passed under section 10 (2) were in the result quashed. In view of these remarks the ruling to the contrary in the instant decision may require re-consideration. It will on such facts make no difference whether the debt admitted by the debtor in his application is a simple debt or a secured debt. Merely to emphasise the absolute character of the penalty in section 10 (2) without any advertence to the object underlying the section or its policy will in the circumstances not be justifiable.

VENKATAKRISHNAYYA v. LAKSHMAMMA, (1943) 2 M.L.J. 359.

To treat the decision in this case that, where in pursuance of a compromise entered into between a husband and wife in regard to past and future maintenance pending an appeal from a decree for separate maintenance passed in favour of the wife the latter lived with her husband for a few months but later on left him and sought to execute the compromise decree the resumption of cohabitation cannot be deemed to be a bar to the execution of the decree, as laying down a principle of law applicable generally and outside its special facts may not be justified. In England, the general doctrine is clear that a reconciliation between the spouses after a separation entirely did away with the effects of separation, *Bateman v. Countess of Ross*¹. Resumption of cohabitation after the passing of an order for separation and award of separate maintenance has the effect in law of annulling the order, *Haddon v. Haddon*²; see also *Williams v. Williams*³ and *Linton v. Linton*⁴. Condonation accompanied by action amounts to the overlooking of past wrongs showing that they are forgiven, *Henderson v. Henderson*⁵.

The ruling in *Haddon v. Haddon*²—a case under section 4 of the Matrimonial Causes Act, 1878—has been followed in this country as well. In *Ellen Ma Noo v. William Po Thi*⁶, a decree for judicial separation and alimony was passed in 1903. The wife lived separately from the husband till 1907 and re-joined her husband in that year. Fourteen years later she left her husband and applied for execution of the decree for alimony which had been passed in her favour in 1903. It was held that she was not entitled to execute the decree and that if she desired to obtain an order for maintenance or alimony she will have to institute fresh proceedings founded on allegations of further cruelty. In *U Po Shein v. Ma Sein Mya*⁷, it was laid down that a *bona fide* re-union must be deemed to have removed the basis on which the order for maintenance rests and therefore as vacating the order. But in *Kanagammal v. Pandara Nadar*⁸, the view was expressed that when a wife has obtained an order for maintenance under section 488, Criminal Procedure Code and has subsequently returned to her husband, the order is not put an end to but its operation is merely suspended during the period of cohabitation. The same conclusion was reached by the Allahabad High Court in *Pearey Lal v. Naraini*⁹. These latter decisions were however disapproved in *Venkayya v. Raghavamma*¹⁰, where it was held that a decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation and that where the wife resumes cohabitation after obtaining the maintenance decree, the decree stands annulled by reason of the resumption of cohabitation and therefore the wife cannot execute the decree. As pointed out in *Venkatarama Raju v. Rajagopala Raju*¹¹, cruelty is a matrimonial offence which is condoned by resumption of cohabitation and condonation cannot be conditional, with the result that, when cohabitation is resumed, the husband cannot be deemed to be on probation, so that the previous cause of action can be revived if the wife is not satisfied with the husband's behaviour. In view of these categorical pronouncements, it is doubtful whether it will be permissible to distinguish the ruling in *Venkayya v. Raghavamma*¹⁰, as one turning on the intention of the parties in that case, actual or constructive, or to hold the case under notice to be outside the purview of the doctrine propounded there because "in the present case the wife clearly had no intention of abandoning her rights under the decree by adopting a fresh relationship with her husband" and because it was also clear that "had her right to enforce her decree not been emphasised . . . she would have been unwilling to have entered into any compromise at all."

1. (1813) 1 Dow 235; 3 E.R. 684.

3. (1904) Prob. 145.

5. (1944) 1 All.E.R. 24 (H.L.).

7. (1930) I.L.R. 8 Rang. 460.

9. (1935) I.L.R. 58 All. 379.

11. (1943) 2 M.L.J. 641.

2. (1887) 18 Q.B.D. 778.

4. (1885) 15 Q.B.D. 239, 245.

6. (1924) I.L.R. 2 Rang. 163.

8. (1926) 52 M.L.J. 76; I.L.R. 50 Mad. 663.

10. (1941) 2 M.L.J. 263.

HEMRAJ v. KHEM CHAND, (1943) 2 M.L.J. 397 (P. C.).

This decision contains as it were a re-statement and retrospect of the principles of Hindu law relating to avyavaharika debts. Under the Shastras the son is under a pious duty to pay his father's debts. But this obligation is not unqualified. It is only the ancestral property, in which the son, as the son of his father acquires an interest by birth, that is liable for the father's debts, *Girdharee Lal v. Kantoo Lal*¹. Again the duty cast on the son being moral and religious, no liability will arise where the debt is incurred for a cause repugnant to good morals. These principles were laid down early, *Hanuman Persaud Panday v. Mt. Babooee Moonraj Koonwaree*². In the words of Knight Bruce, L.J., "the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate."³ The Smṛiti texts on which the qualification rests are exhibited in the judgment of Mookherjee, J., in *Chhakauri Mahton v. Ganga Prasad*⁴. The texts mention various categories only. One of such texts,—a text of Usanas—mentions a supplementary category of debts which the son need not pay (which, under the judicial decisions has however become a compendious head subsuming almost all the enumerated categories), namely, 'avyavaharika debts.'

There has been much difference of opinion as regards the precise significance of the term 'avyavaharika.' While Mandlik renders it as 'not proper', Colebrooke treats it as equivalent to "debts for a cause repugnant to good morals." In *Durbar Khachar v. Khachar Harsur*⁵, the Bombay High Court has explained the term as meaning "unusual or not sanctioned by law . . . Put into simple English the texts amount to this: that the son is not held liable for debts which the father ought not as a decent and respectable man to have incurred. He is answerable for debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices." In Calcutta, Mookherjee, J., construed the term as meaning "not lawful, usual or customary, *Chhakauri Mahton v. Ganga Prasad*⁴. In Madras, in *Venugopala Naidu v. Ramanadhan Chetty*⁶, Sadasiva Ayyar, J., explained it as "a debt which is not supportable by legal arguments and on which no right could be established in the creditor's favour in a Court of Justice." These and other interpretations of the term are collected in *Rajaram Tukaram v. Maneklal Mansukhbhai*⁷. There is in fact a bewildering array of decisions touching the import of 'avyavaharika debts.' In the circumstances, the Judicial Committee point out, in the instant decision, that no useful purpose will be served by reviewing them all, particularly as the principles with reference to which the term 'avyavaharika' should be interpreted are according to their Lordships sufficiently clear. Those principles are: (i) the character of the debt should be probed with reference to justice and morality; (ii) the probing should be with reference to the time when the debt originated; (iii) if at that point of time the debt was not tainted with illegality or immorality the debt is not 'avyavaharika'; (iv) this rule is not rigid but has to be applied with reference to the circumstances of each case; (v) the translation of 'avyavaharika debts' by Colebrooke as 'illegal and immoral debts' makes the nearest approach to the true conception of the term as used in the Smṛiti text and may well be taken to represent its correct meaning; (vi) these principles are not exhaustive but only basic. Their Lordships' decision is of great value as a restatement of the law and as avoiding the necessity for any excursion into earlier case-law.

According to the instant decision, *Tashanpal Singh v. District Judge of Agra*⁸ has definitely established that a son is not liable to pay a debt created by his father which would render the father liable to criminal prosecution. In that case their Lordships had found that the father was in relation to the moneys in question

1. (1874) L.R. 1 I.A. 321 (P.C.).

3. *Ibid.*, 421.

5. (1907) I.L.R. 32 Bom. 348.

7. (1932) I.L.R. 56 Bom. 36.

2. (1856) 6 M.I.A. 393.

4. (1912) I.L.R. 39 Cal. 862.

6. (1914) 23 M.L.J. 61; I.L.R. 37 Mad. 458.

8. (1934) 68 M.L.J. 1; L.R. 61 I.A. 350; I.L.R. 56 All. 548 (P.C.).

"guilty of a criminal breach of trust *simpliciter*." Whether even in respect of a debt of the father with a stigma far short of criminality the sons cannot be held liable or whether when once a liability *ex contractu* or *quasi ex contractu* has arisen the right of action in respect of that is enforceable against the sons although it appeared that ultimately the father has made away with the fund criminally, were left open. The scope of that decision fell to be considered in *Anand Rao v. President, Co-operative Credit Society, Pedatadehalli*¹, where it was held that that case "fell within the class of cases where the original taking or withdrawal itself amounted to an offence." It was also observed: "That the sons are bound by reason of their pious obligation to discharge a debt arising out of a civil liability of their father is well settled. The application of this principle is beset with difficulty in cases where the father receives or retains money with a duty to apply it for the benefit of a third party but omits so to apply it." The case under notice is just of that type. The father had at a partition between him and another sharer through Court been directed and accordingly had undertaken to produce a promissory note in relation to family funds lent out in his own name, within a certain time and before the debt became barred, for being handed over to the other sharer to whom it had been allotted. He did not do so and allowed the promissory note to get time-barred by acting fraudulently towards his co-sharer. In the circumstances the Privy Council held that the "subsequent dishonest conduct of Danpal, which led to the suit . . . cannot in their Lordships' view affect the nature of the father's debt which at its inception was a just and true debt. As no such immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has been shown by the respondents, the debt sought to be realised is not an ayyavaharika debt." Thus if at the inception there is no taint of illegality or immorality about the liability any subsequent dishonest, criminal, or morally culpable conduct of the father in relation to the amount is irrelevant and the sons will not be exempt from the operation of the pious obligation doctrine.

SHEIK RAHMAT ILAHI v. MOHAMMAD HAWAT KHAN, (1943) 2 M.L.J. 606 (P.C.)

This case constitutes a noteworthy pronouncement in regard to the scope of section 100, Civil Procedure Code. That section states: "an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely, . . . the decision being contrary to law." What precisely is the meaning of "contrary to law" has baffled definition and has been the subject of a large number of judicial pronouncements. It is well settled that where the controversy on the second appeal could turn only on the weight of evidence the second appeal will not be competent, *Mt. Durga Choudhrai v. Jawahir Singh Chowdhuri*². Misconception as to the real question of fact to be tried in the case will however be an error of law within the language of section 100, *Damusa v. Abdul Samad*³. As pointed out in *Mt. Anupa Bai v. Bhagwant Singh*⁴, there is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case. In the instant decision the Privy Council points out that there is no difference between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine a question of fact which vitally affects the issue as stated in the case and that in either case the failure is a failure in the duty imposed by law on the Court and such a failure is really a question of law.

1. (1940) 2 M.L.J. 179.

3. (1919) 37 M.L.J. 36 : L.R. 46 I.A. 140 : I.L.R. 47 Cal. 107 (P.C.).

4. I.L.R. (1938) Nag. 535.

2. (1890) 17 I.A. 123 : I.L.R. 18 Cal. 23 (P.C.). See also *Wali Mohammad v. Mohammad Baksh*, (1929) 59 M.L.J. 53 : L.R. 57 I.A. 86 : I.L.R. 11 Lah. 199 (P.C.).

CHINNASWAMI BATTAR v. RAMASWAMI PILLAI, (1943) 2 M.L.J. 653.

In regard to the liability of an accounting party to pay interest on sums found due from him different starting points have been adopted in different cases. If there was a liability to pay on a fixed date there is no doubt that under the Interest Act, interest would be payable from that date. In other cases interest has been allowed sometimes from the date of collection, *A. W. Inglis v. Sarju Prasad Misser*,¹ *Abdul Jalil v. Mohamad Abdul Salam*²; sometimes from the date of suit, *Lala Hakim Rai v. Lala Ganga Ram*³; and in certain cases from the date of the passing of the final decree, *Suleman v. Haji Abdul Latif*⁴. Where a sum collected has in fact been put by the accounting party to interest or may be presumed to have been so invested or where there is a duty on the part of the accounting party to so invest interest will be ordered to be paid as from the date of the collection. *A. W. Inglis v. Sarju Prasad Misser*¹, was a case where the Court had proceeded on the basis that from the facts it was entitled to presume that the person recovering the money had put that money out to interest (p. 318). In *Abdul Jalil v. Mohamad Abdul Salam*², the Court had proceeded on the assumption that the co-sharer who was made liable for interest was liable to hand over to the other co-sharer a sum of money at a given date. It was held in *Tasobadra Nainar v. Samantabadran*⁵ that the managing member in a joint family cannot on any equitable ground be made liable in a suit for partition to pay interest on moneys collected unless interest had in fact been earned; see also *Ramachandrappa v. Narayanappa*⁶. Three decisions of the Privy Council relating to the award of interest against a partner found liable to account are greatly helpful in this connection. They are the decisions in *Ahmed Musa Saleji v. Hashim Ebrahim Saleji*⁷, *Suleman v. Haji Abdul Latif*⁴ and *Lala Hakim Rai v. Lala Ganga Ram*³. In a suit *simpliciter* for a dissolution of a partnership and winding up its affairs interest may be ordered only from the date of the final decree, *Suleman v. Haji Abdul Latif*⁴. In that case Lord Russell of Killowen observed: "This is not an action to recover some debt of which it can be said that it was due at the date of the plaint. It is an action to dissolve and wind up the affairs of a partnership; and until the accounts have been taken it is impossible to say what if anything is due from any partner to his co-partners. In their Lordships' opinion interest should only be allowed to the plaintiff from the date of the final decree." Where however the partnership is not a going concern but already dissolved prior to the suit and the accounting party has retained some assets and applied them for his own benefit interest will be chargeable as from the date of suit. Thus it was stated by Lord Sumner in *Ahmed Musa Saleji's case*⁷: "It is well settled that in certain cases where on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit he may be ordered to account for these assets with interest thereon, and this, apart from fraud or misconduct in the nature of fraud." The position was further clarified by Lord Romer in *Lala Hakim Rai's case*³, where he said: "But that case (*Suleman v. Haji Abdul Latif*⁴) was concerned with an ordinary suit for the dissolution and the winding up of the affairs of a going partnership. The present case is widely different. It is a suit brought nearly two years after the dissolution of a partnership against the former managing partner who has been retaining in his hands and for his own purposes assets of the firm without accounting for them or their proceeds to his co-partner. In such a case interest is properly chargeable against the accounting defendant even though he has not acted fraudulently as was held by this board in *Ahmed Musa Saleji v. Hashim Ebrahim Saleji*⁷. Inasmuch as in the decision under notice the amount found payable was not an amount payable at a particular date nor an amount which had earned interest or in respect of which there was a duty to put out to interest, it was held that the award of interest prior to the date of suit was indefensible.

1. (1923) I.L.R. 3 Pat. 311.
2. A.I.R. 1932 All. 505.
3. (1943) 1 M.L.J. 16 (P.C.).
4. (1930) 59 M.L.J. 121; L.R. 57 I.A. 245; I.L.R. 58 Cal. 208 (P.C.).
5. (1935) 70 M.L.J. 311; I.L.R. 59 Mad. 154.
6. 1939 M.W.N. 927.
7. (1915) 29 M.L.J. 70; L.R. 42 I.A. 9; I.L.R. 42 Cal. 914 (P.C.).

SAROJINI DEVI v. SRI KISTNA ANJANEYA SUBRAMANYAM, (1944) 1 M.L.J. 361.

A question of great importance, namely, the meaning of the expression "agricultural land" in Lists II and III of the Government of India Act, 1935, fell to be directly decided in the above case, in connection with the devolution of a mango grove on the death of its owner, whether it would pass under the principles of Hindu law or, whether succession would be regulated under the provisions of the Hindu Women's Rights to Property Act, 1937. It was held that, for the purposes of the Constitution Act, the expression "agricultural land" must receive the widest meaning, that it must be taken to include lands which are used or are capable of being used for raising, any valuable plants or trees or for any other purpose of husbandry. The conclusion in favour of a liberal construction receives considerable support from the discussion on the meaning of "agricultural land" to be found in the judgment of the Federal Court in *Megh Raj v. Allah Rakkia*¹, which however does not seem to have been noticed in the instant case.

Entry No. 21 of List II of Schedule VII to the Constitution Act refers to "land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents, transfer, alienation and devolution of agricultural land, etc." The expression "agricultural land" is also found in Entry 43, and in Entries 7, 8 and 10 of the Concurrent List and Entry 56 of List I. It also occurs in other contexts, as in sections 137, 298, etc. The precise connotation of the expression is a matter of paramount importance in that thereon will turn the validity of any legislation touching the subject and the competency of the particular legislature, provincial or central to legislate upon the particular matter. The Constitution Act does not give any definition of "agricultural land" and except for the mention in Entry 20 of List II of what "agriculture" for the purposes of the Act would include, there is no help to be derived from it on this question.

The terms 'agriculture',² 'agricultural income',³ and 'agricultural purposes',⁴ are to be found in different Acts with varying contents. The term 'agriculture' is in some cases used in a narrow sense while in other cases it is used in a wider sense. Section 3 (1) of the Madras Estates Land Act, for instance states: "Agriculture with its grammatical variations and cognate expressions shall include horticulture," thereby suggesting that for the purposes of that Act at any rate, but for the specific mention it would be doubtful whether agriculture would include horticulture. Specimens of the larger sense in which 'agriculture' is to be understood are afforded by the definitions provided in other enactments, such as, the Bengal Agricultural Debtors Act and the Madras Debt Conciliation Act. Section 2 (a) of the former Act states: "'Agriculture' includes horticulture and dairy farming and the use of land for any purpose of husbandry inclusive of the keeping or breeding of livestock, poultry or bees and the growing of fruits, vegetables and the like." Section 21 (c) of the latter Act is only slightly different and states: "'Agriculture' includes horticulture, the use of land for any purpose of husbandry inclusive of the keeping or breeding of livestock, poultry or bees, sericulture and the growing of fruits, vegetables, and the like." The expression 'agricultural land' itself has come in for definition in the United Provinces Regulation of Sales Act, 1934, section 2 (2) where it is stated that it "means land which is let or held for agricultural purposes or as grove land or for pasturage and shall include any interest in such land." It is however difficult to obtain any light from any of these definitions inasmuch as they all appear to be framed with reference to the special policy of the particular legislation in question. In England also the term 'agriculture' has been variously defined. According to 8 Edw. VII, c. 36, 'agriculture' would include horticulture and the

1. (1942) 5 F.L.J. 33 (F.C.).

2. Section 3 (1), Madras Estates Land Act, 1908; section 2 (2) Madras Debt Conciliation Act, 1936; section 2 (1), Bengal Agricultural Debtors Act, 1935; section 7 (3), Punjab

Relief of Indebtedness Act, 1934.

3. Section 2 (1), Income-tax Act, 1922.

4. Section 117, Transfer of Property Act, 1882; sections 11, 151, etc., Madras Estates Land Act, 1908.

use of land for any purpose of husbandry. Section 41 of 10 Edw. VII. c. 8 states that 'agriculture' includes use of land as meadow or pasture land or orchard or osier; or woodland or for market gardens, nursery grounds, etc. In 57 and 58, Vic. c. 30, section 122 'agricultural property' is stated to include agricultural land, pasture and woodland, etc. It is thus clear that it will be neither useful nor legitimate to draw any inference from any of these statutory definitions for the purpose of determining the ordinary connotation of the expression "agricultural land" in the English language.

Etymologically 'agriculture' is derived from Latin *agricultura*; *ager*, a field and *cultura*, cultivation. Agriculture is thus the art or practice of cultivation, an act requiring the preparation of the soil with a view to raise thereon some product. According to the Oxford Dictionary, it is the science and art of cultivating the soil, tillage, husbandry, farming (in the widest sense). Bouvier defines 'agriculture' as the cultivation of soil for food products or any other useful or valuable growths of the field or garden. It seems to be implicit in every one of these definitions that agriculture involves (i) preparation of the soil and (ii) the raising on it of any useful or valuable growth deriving or drawing nutriment from the soil. Any land which is so used or is capable of being so used would *prima facie* be agricultural land.

Turning to the judicial decisions, there again 'agriculture' is found variously defined. In *King-Emperor v. Alexander Allen*¹, it is understood in a wide sense so as to make even lands used for pasture fall within the category of 'agricultural land.' At least four different approaches to the question are discernible in the decided cases. According to Sadasiva Ayyar, J., it is the periodical raising of a grain crop that is the test of agriculture ordinarily. Thus in *Maharajah of Venkatagiri v. Ayyappa Reddi*², the learned Judge remarked: "The ordinary meaning of agriculture is the raising of annual or periodical grain crops, through the operations of ploughing sowing etc." See also *Seshayya v. Maharajah of Pittapur*³, and *Maharajah of Venkatagiri v. Rami Reddi*⁴. A slightly different test of agriculture, namely, that it is the raising of food for man or beast either as article of diet or by way of luxury, was propounded by Bhāshyam Ayyangar, J., in *Murugesu Chetti v. Chinnathambi Goundan*⁵, where, in holding that land leased for cultivating betel was land leased for an agricultural purpose within the meaning of the Transfer of Property Act, the learned Judge observed: "Agriculture as distinguished from horticulture includes not only all field cultivation by tillage but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury, if not as an article of diet." On this test, the cultivation of indigo, flax, hemp, etc., would be outside the scope of the expression 'agricultural purpose.' The test however is consistent with the conclusions in *Venkayya v. Ramaswami*⁶, where it was stated that land used for a cocoanut garden must be deemed to be land used for an agricultural purpose and in *Kaju Mal v. Salig Ram*⁷, where the Privy Council held that land used as a tea garden was used for an agricultural purpose within the meaning of the Punjab Land Alienation Act. See also *Pravat Chandra Syam v. Bengal Central Bank, Ltd.*⁸, and *Shiba Kali Kumar v. Chuni Lal*⁹. It also fits in with the view expressed by Rowland, J., in *Deen Mohammad Mian v. Hulas Narayan*¹⁰, that the expression 'agricultural land' is not to be read as limited to land on which by seasonal ploughing and sowing food crops are grown but that it will include orchard land, also. A different test and a comprehensive one was propounded by Spencer, J., in *Pavqadai Pathan v. Ramaswami Chetti*¹¹, where

1. (1901) 12 M.L.J. 393; I.L.R. 25 Mad. 627; see also (1924) I.L.R. 2 Rang. 211; A.I.R. 1924 Cal. 668; 34 C.W.N. 1063; A.I.R. 1931 Cal. 315; 11 I.C. 342; (1929) 4 Luck. 649.

2. (1913) 25 M.L.J. 578; I.L.R. 38 Mad. 738.

3. (1914) 31 M.L.J. 214.

4. (1919) 36 M.L.J. 211.

5. (1901) I.L.R. 24 Mad. 421, 425.

6. (1899) 8 M.L.J. 278; I.L.R. 22 Mad. 39.

7. (1923) 46 M.L.J. 536; I.L.R. 5 Lah. 50 (P.C.).

8. I.L.R. (1938) 2 Cal. 434.

9. (1927) 31 C.W.N. 1007.

10. (1942) 5 F.L.J. 79, 86 (H.C.).

11. (1922) 43 M.L.J. 191; I.L.R. 45 Mad. 710.

it was held that a lease of land for growing casuarina trees to be used as fuel would be a lease for an agricultural purpose within the meaning of section 117 of the Transfer of Property Act. He remarked : " 'Agriculture' connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour ; and thus it will include horticulture, arboriculture, and silviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc." Thus agriculture means the raising of a useful or valuable product deriving nutriment from the soil, by human labour. This test makes no advertence to periodicity in regard to the product raised. On this test land covered with a natural forest could not be agricultural land. This is consistent with the rulings in *Kaju Mal v. Salig Ram*¹ and *Province of Bihar v. Pratap U. N. S. Deo*². But a land on which trees may have to stand for a number of years, having been planted by man might yet be agricultural land. The test has therefore come in for criticism by Reilly, J., in *Chandrasekhara Bharati Swamigal v. Doraiswami Naidu*³, where he remarked : " When land is covered with trees which have to stand on it for a number of years sometimes as long as a century, during most of which period the land itself is untouched, to describe that as agriculture seems to me inappropriate." In *Kesho Prasad Singh v. Sheo Prakash Ojah*⁴, it was held that land containing a grove would not be land held for agricultural purposes within the meaning of section 79 of the Agra Tenancy Act, though the concerned grove, as is clear from the judgment of the High Court in *Kesho Prasad Singh v. Sheo Prakash Ojah*⁵, was one consisting of fruit-bearing trees planted on land granted by the zemindar. But as pointed out by Varadachariar, J., in *Megh Raj v. Allah Rakhia*⁶, the cases which took the view set out in *Kesho Prasad Singh's case* (such as, *Gulab v. Bhagwan Das*⁷, *Kesho Das v. Hanuman Pandey*⁸, *Bajinath Singh v. Chandra Pal Singh*⁹) proceeded mainly on the supposed intention of the Agra Tenancy Act and the prevailing custom according to which a grove holder only owns the trees and has no right as a rule in the land after the trees have been cut. The Privy Council decision in *Kesho Prasad Singh's case*⁴, cannot therefore be considered as laying down that grove land cannot be agricultural land or as propounding any test of general application. In *Chandrasekhara Bharati Swamigal v. Doraiswami Naidu*³, Reilly, J., prescribed a different approach in regard to what is agriculture. He observed : " 'Agriculture' cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on." The test thus indicated may be appropriate as regards the Estates Land Act, in view of the policy of that Act and the provisions in it tending towards such a conclusion, but will *prima facie* be inappropriate in regard to the construction of the expression 'agricultural land' in the Government of India Act, Entry 21 of List II, inasmuch as it would be anomalous to make succession to land depend upon "the circumstances in which cultivation is carried on." In the same way, the decisions holding that income derived from flooding the land occupied by sea water and then extracting salt would not be agricultural income, *Commissioner of Income-tax v. Linga Reddi*¹⁰, or that income from sale of timber will not be agricultural income, *Commissioner of Income-tax v. Manavedan Tirumalpad*¹¹, or that income realised from the use of a tank, or lease of it, for fishery is not exempt from income-tax, as agricultural income, *Secretary to the Chief Commissioner of Income-tax, Madras v. Zemindar of Singampatti*¹², *Commissioner of Income-tax v. Sevuga Pandia Thavar*¹³ are to be understood in the light of the policy embodied in and the special provisions of the Income-tax Act.

1. (1923) 46 M.L.J. 536 : I.L.R. 5 Lah. 50 (P.C.).

3. (1931) 61 M.L.J. 648 : I.L.R. 54 Mad. 900.

5. (1921) I.L.R. 44 All. 19, 33.

7. (1924) 21 A.L.J. 907.

9. (1924) I.L.R. 47 All. 55.

11. (1930) I.L.R. 54 Mad. 21 (F.B.).

2. (1941) 4 F.L.J. 109 (H.C.).

4. (1923) I.L.R. 46 All. 831 (P.C.).

6. (1942) 5 F.L.J. 33 (F.C.).

8. (1922) I.L.R. 45 All. 640.

10. (1927) I.L.R. 50 Mad. 204 (F.B.).

12. (1922) I.L.R. 45 Mad. 518.

13. (1932) I.L.R. 56 Mad. 251 : 63 M.L.J. 634 (F.B.).

In *Megh Raj v. Allah Rakhia*¹, the Federal Court was invited to elucidate the meaning of the expression 'agricultural land' as used in Lists II and III of the Constitution Act, but, in the view taken on the other contentions raised in the case, it was not necessary for the learned Judges to consider this question. After some discussion just to indicate the conflicting character of the dicta to be found in the judicial pronouncements as to the meaning of agriculture, Varadachariar, J., observed: "In this state of the authorities, it seems to us best to refrain from deciding the precise scope of the expression 'agricultural land' or the propriety of excluding 'land on which a grove has been planted' from the category of 'agricultural land'. It may on a proper occasion be necessary to consider whether for the purposes of the relevant entries in Lists II and III of the Constitution Act it will not be right to take into account the *general character* of the land (as agricultural land) and not the use to which it may be put at a particular point of time. It is difficult to impute to Parliament the intention that a piece of land should, so long as it is used to produce certain things, be governed by and descend according to the laws framed under List II but that when the same parcel of land is used to produce something else (as often happens in this country), it should be governed by and descend according to the laws framed under List III." The instant case is noteworthy not only for its decision on the precise scope of the expression 'agricultural land' in the Lists II and III of the Constitution Act in regard to the law applicable to their devolution but also for the forceful reasoning inducing the learned Judges to construe the expression in a wide sense. Having regard to the context in which the expression occurs, namely, in provisions dealing with the distribution of legislative powers between the Central and the Provincial legislatures, it was held that the expression 'agricultural land' should not be construed narrowly. Patanjali Sastri, J., observed: "The expression 'agricultural land' must receive the widest meaning, for it would be somewhat grotesque to suppose that Parliament intended that lands devoted to one kind of crop should devolve according to laws passed by Provincial legislature, while those used for growing another kind should pass according to laws passed by the Central legislature, or that the circumstances in which the cultivation is carried on should determine the law which governs the devolution of the land. Nor could it have been intended that succession to such lands should depend on the degree of tillage or preparation of the soil or of the skill and labour expended in rearing and maintaining the plants. We are of opinion that for the purposes of the relevant entries in Lists II and III of schedule VII, the expression 'agricultural lands' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry." The view thus taken accords with the suggestion thrown out and the reasons mentioned by the Federal Court in *Megh Raj v. Allah Rakhia*¹.

BILASRAI JOHARMAL v. SARUPCHAND, (1944) 1 M.L.J. 466 (P.C.).

The principles which the Court will observe in taking upon itself to interfere with the administration of a charity, when that charity has to be conducted in a foreign country, fell to be considered by the Judicial Committee in the above case. It is well-known that as a Court of equity acts in *personam* it may and sometimes does exercise jurisdiction over trustees and others in respect of foreign land and otherwise in connection with rights to property situate abroad. And the principle has been long established that where the charitable objects lie without the jurisdiction of the Court the most the Court can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave the application of them to the intended objects of the settlor's bounty to the Courts of the country within whose jurisdiction those objects are, *Advocate-General of Bombay v. Punjabari*¹, *Kanji Jethsi v. Advocate-General*². Thus the Court will not frame a scheme in respect of such a charity but will take only such steps as are necessary to safeguard such trust funds as are within its jurisdiction. Equally well settled is the principle that the jurisdiction of the Court to remove trustees is merely ancillary to its principal duty to see that the trusts are properly executed and in exercising so delicate a jurisdiction as that of removing trustees the main guide for the Court must be the welfare of the beneficiaries, *Letterstedt v. Broers*³.

In the case under notice, the charity concerned was a hospital carried on within the borders of an Indian State. The sole ground of complaint against the trustees was that they had without authority changed the name of the hospital. The remedy sought in the suit was the removal of the trustees. The fact relied on as giving jurisdiction to the Courts in Bombay was the investment of certain trust funds in Bombay. On these facts, the trial Court held—"somewhat unreasonably", according to the Privy Council—that if the name was changed without proper authority the application of the hospital funds to the hospital with the changed name was a misapplication of those funds and amounted to a breach of trust. The Court also directed the removal of the trustees after their refusal to resign as suggested by it. Reversing this order and approving the conclusions of the appellate bench, the Privy Council laid down that "a charity does not change its nature merely by a change of name and that on any view the change of name was not such a serious breach of trust as to justify the removal of the trustees". The Board also held that to require the trustees to resign and on their refusal to direct their removal from office "was to take action far in excess of anything that was called for". In the words of Sir George Rankin: "It would be plainly inconvenient if not intolerable that the Courts of a foreign country should interpose their authority upon particular questions arising in the course of administering such a trust—acting intermittently according as they may be invoked by particular complainants in preference to the Courts of the country in which the charity was meant to operate and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs".

RAMESHWAR NATHANI v. SUBODH GOPAL BASU, I.L.R. (1943) 2 Cal. 167.

The above case elucidates an interesting question concerning the scope of the presumption as to the correctness of entries contained in a finally published record of rights. Section 103-B of the Bengal Tenancy Act lays down in clause (5) that every entry in a record of rights finally published shall be evidence of the matter referred to in such entry and shall be presumed to be correct unless it is proved by evidence to be incorrect. Section 167 (3) of the Madras Estates Land Act has enacted the same rule in almost identical language. The question that fell to be decided in the case under review was as to

1. (1894) I.L.R. 18 Bom. 551.

3. (1884) 9 A.C. 371.

2. (1915) 18 Bom.L.R. 60.

which entry was to prevail in a case of conflict between an old record of rights and a recent one. It is clear law that a finally published record of rights is presumptive evidence with regard to the conditions which existed *at the time the record was prepared*, and in the case of a record of rights if any party is aggrieved by an incorrect entry in the later record he can have it corrected either by suit or in proceedings for settlement of the record and if no recourse is had to that machinery the entries in the record will be presumed to be correct till the contrary is proved. As pointed out by Kulwant Sahay and Macpherson, JJ., in *Abhiram v. Chintamani*¹, if there are two records of rights prepared at different times entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made and there is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. In accordance with these principles, in *Bhupendra Krishna Ghose v. Abdur Rahaman*², M. C. Ghose, J., had held that when there is a conflict between an old record of rights and a recent record of rights the recent record is presumed to be correct and not as rebutted by the entry in the old record as the entries relate to different periods of time. The rebuttal of the presumption of correctness of the later entry will have to be made by other and independent evidence. The instant decision has taken this view and in doing so stands supported both by the language of the statutory provisions and the precedents on the point.

RAM TARAK SINGHA v. SALGRAM SINGHA, I.L.R. (1943) 2 Cal. 192.

This decision deals with a point in tenancy law practically uncovered by authority. One of the grounds on which a ryot may apply for a reduction of rent under section 38 of the Bengal Tenancy Act is "that there has been a fall not due to a temporary cause, in the average local prices of staple food-crops during the currency of the present rent". Section 38 of the Madras Estates Land Act contains a similar provision couched in similar language. The meaning of the words "not due to a temporary cause" is made somewhat baffling and obscure by reason of the negative form adopted. 'Temporary' is the antonym of permanent. In the context of tenancy legislation the latter term is employed not absolutely but in a relative sense merely. It does not mean 'lasting for ever'; it only means 'lasting indefinitely'. As observed by Holmwood and Walmsley, JJ., in *Babu Krishna Sahay v. Palakdhari Rout*³, the word 'permanent' should be construed with reference to existing conditions and the more uncertain the result is the more it must be held to come within the meaning of the term 'permanent'. Indefiniteness of duration is thus a necessary concomitant of permanence. If the duration is limited or certain then permanence is lacking. This is also consistent with the accepted expositions of the word 'temporary'. *Bouvier*⁴ defines 'temporary' as that which is to last for a limited time. Do the words 'not due to a temporary cause' in section 38 of the Bengal Tenancy Act and section 38 of the Madras Estates Land Act mean due to a permanent cause or due to a cause which might continue over an indefinite period of time? This does not seem to be quite the sense in which those words should be understood. In both Acts in detailing the other grounds on which reduction of rent may be claimed, such as, deterioration of the soil, the term 'permanent' is used. Only in regard to fall in prices the expression 'not due to a temporary cause' is employed. If 'not temporary' can be equated with 'permanent' there is no reason why the legislature should have preferred to use different language with reference to fall in prices as a ground for reduction of rent. Will it not therefore be justifiable to infer that by the words 'not temporary' the legislature contemplated a state

1. (1926) I.L.R. 6 Pat. 342.

2. (1934) 61 Cal.L.J. 18.

3. (1915) 25 Cal.W.N. 1157.

4. Law Dictionary, p. 573.

of affairs somewhat different from 'permanent', in other words a cause which while not being fleeting or evanescent would at the same time not remain for long either, a cause the effect of which will be felt for a period no doubt indefinite but not very long? In regard to fall in prices the event occasioning the fall might itself not be temporary, as for instance, a glut in the locality due to absence of demand from outside, or its influence on the public may not be temporary, as for example, where an order which had frozen the stock is suddenly withdrawn, or its effect on prices may not be temporary, due for instance, to prices being controlled for the duration of the war. From whatever standpoint the period during which the fall in prices is likely to continue is sought to be assessed, if it is clear on the facts of the case, that such duration will be indefinite and at the same time will be neither short nor prolonged, it may legitimately be said that the fall in prices is due 'not to a temporary cause'.

SAPARADDI GAZI v. RAHIM BUX MOLLA, (1943) 2 Cal. 204.

A practice point of some importance in the law relating to receivers fell to be considered in the above case which held that where a receiver is charged with wilful default or gross negligence with regard to the administration of the property placed in his charge an inquiry into the allegations should be made in a summary proceeding under Order 40, rule 4 of the Civil Procedure Code and the parties should not be referred to a separate suit. If the enunciation was intended to be absolute it will not be easy to reconcile it with authority; if however it was intended to indicate what ordinarily should be done it would be un-exceptionable. Prior to the introduction of the present Order 40, rule 4, in *Coomar Sattya Sankar v. Ranees Golapmonee Debee*¹, it was held that where there is a question of the receiver's liability to render accounts the proper course is either to postpone the passing of accounts until the question of the receiver's liability is established by suit or to pass the accounts reserving the rights of the parties to establish by suit any claim that may be made against the receiver. In other words a suit was considered in such circumstances to be the proper mode of obtaining redress against the receiver. In *Kamatchi Ammal v. Sundaram Aiyar*², a different view was disclosed and it was stated that redress against the receiver should generally be sought in the very proceeding in which he was appointed. The new Order 40, rule 4 provides that in case the receiver fails to submit accounts or fails to pay the amount due as the Court directs or occasions loss to the estate by his wilful default or gross negligence the Court may direct his property to be attached and may sell such property and apply the sale proceeds to make good any amount which may be found due from him or any loss occasioned by him. The Madras Amendment to Order 40, rule 4 makes it absolutely clear that the Court may at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion at any time make an enquiry *inter alia* whether any loss has been occasioned by his wilful default or gross negligence, provided however that the Court may, where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. The nature of the provision contained in Order 40, rule 4 as amended in Madras was considered in *Somasundaram Chettiar v. Kannammal*³, and there seems to be some difference of opinion as to the procedure to be adopted by the Court. According to Mockett, J., Order 40 contemplates an enquiry in cases of wilful default or gross negligence but is not designed to cover what in substance is a case of conversion; wilful default is far removed from deliberate fraud and where fraud is alleged the matter is suitable for a suit only. The other learned Judge, Bell, J., observed that where there is any charge of fraud involved the Court must deal with it either by an enquiry or

1. (1900) 5 Cal.W.N. 223.

2. (1902) I.L.R. 26 Mad. 492.

3. (1944) 1 M.L.J. 368.

by directing the parties to a suit. With respect, it is submitted that to lay down categorically that where fraud is alleged a suit only should be brought does not allow for the discretion exercisable by the Court under Order 40, rule 4 as it stands. Whether an inquiry can proceed or whether the parties should be directed to a suit must turn on the facts of each case and cannot be the subject of an absolute prescription. The same position would be essentially true under Order 40, rule 4 as it stands elsewhere. Ordinarily the Court would be bound to deal with all matters relating to the receiver in the very proceeding in which he was appointed, *Chidambara Nadar v. Mahalinga Nadar*¹ and a separate suit is not necessary, *Suresh Chandra Banerjee v. A. K. M. Enamel Hug*². Even where the accounts filed by the receiver have been passed but afterwards it is found that there is a difference in the amount received by him the proper course is to hold an enquiry to find out whether the receiver had occasioned any loss by his wilful default or gross negligence and to pass an order under Order 40, rule 4. In *Sabal Chandra Kar v. Jatindra Mohan Ghose*³, Rankin, J., held that where the case was of a complicated character the parties should be referred to a suit only and that that was the practice pursued by the Calcutta High Court. The learned Judge observed: "In my judgment, the rule that an application of this character should be made by a suit, whether it be right or wrong, has been recognised for a long time in this Court. In my judgment, it is at any rate, a good general rule in cases of any complication, because there is manifest inconvenience. . . . in dealing with complaints of this character without a properly framed plaint and without a suit being brought in a regular manner". On the authorities it is clear that in cases of allegations of wilful default or gross negligence against a receiver, (i) the Court has a discretion to proceed either by way of a summary enquiry or refer the parties to a suit; (ii) generally the Court would prefer to adopt the former course only; but (iii) where the matter is complicated, as for instance, by allegations of fraud, conversion, etc., being made, it is desirable to refer the parties to a suit. In so far as in the case under notice, which was one where none of the complications existed, the Court held that the party should not be directed to a suit but that the allegations against the receiver should be enquired into by a summary proceeding, the conclusion is consonant with authority. But there are certain observations in the judgment open to comment. On page 208 it seems to be suggested as a proposition of law that a summary enquiry alone would be open and that no suit would lie. It is stated: "This (Order 40, rule 4) contemplates a proceeding of a summary character and *not a suit* (italics ours). . . . The order that the proceeding can culminate in is an order for attachment and sale of the property and the proceeding has to be conducted by the Court itself and not by the party in whose favour the order is made. If Order 40, rule 4 had simply enunciated a right and not the procedure, the provisions would be quite anomalous, for a suit would undoubtedly end in a decree which has got to be executed by the successful party in the usual way and nothing would be left in the hands of the Court". On page 209 however the suggestion seems to be that a suit may lie, but it is "not essential". On page 210 occurs the statement: "In our opinion it cannot be said that a separate suit is the only remedy where a receiver is sought to be made liable on the basis of wilful default and gross negligence and it is quite open to the Court to investigate the matter in a proceeding under Order 40, rule 4 of the Civil Procedure Code". This last observation is unexceptionable. To say that the Court may order a summary enquiry is one thing; to say that a summary enquiry alone would be the proper remedy is altogether a different thing and hence the remarks on page 208 if they tend towards such a conclusion should be understood in the light of the observation on page 210, cited *supra*.

1. (1935) 70 M.L.J. 282.

2. (1935) 40 Cal.W.N. 479.

3. (1926) I.L.R. 53 Cal. 881.

MIDNAPORE ZEMINDARI CO., LTD. v. CHANDRA SINGH DUDHURIA, I.L.R. (1943) 2 Cal. 245.

In *Earl of Darnley v. Proprietors, etc., of London, Chatham and Dover Railway*¹, it was laid down that a waiver to afford an effective plea must have been intentional and with knowledge of one's rights. The position was expressed in different languages in *Earl Beauchamp v. Winn*², by Lord Chelmsford, who remarked: "There can be no doubt that acquiescence to operate as an equitable estoppel must be with knowledge that the party acquiescing has a right which would be available against that which he has permitted to be enjoyed." In India, the doctrine is to be found clearly expounded in *Dhanukari Singh v. Nathina Sahu*³, where it was observed: "A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would enable him to take an effectual action for the enforcement of such rights." The same view has been expressed in *Nadershaw Sheriarji v. Shirinbai Bapuji*⁴. In the case under notice the question arose in connection with the right of a landlord to claim additional rent in respect of land which had accreted to the holding. In coming to the conclusion that the right cannot be deemed to have been waived, the learned Judges point out that "waiver is the abandonment by conduct of a known right. It is an implied agreement not to exercise legal rights." The doctrine that there can be no waiver in respect of unknown rights is one which is strictly in accord with authority.

SUSHIL CHANDRA PRAMANIK v. EMPEROR, I.L.R. (1943) 2 Cal. 322.

Three views more or less are to be found in judicial expositions of the scope of section 256 (1) of the Code of Criminal Procedure. In one view failure to comply with the provisions of the section does not render the trial illegal and can be cured under section 537 in the absence of any prejudice having been caused to the accused, *Phuman Singh v. The Crown*⁵, *Mt. Ghasiti v. The Crown*⁶, *King-Emperor v. Chhajju*⁷, *Nisar Ahmed v. Emperor*⁸. The second view is that such failure vitiates the trial, see *Ramchandra Modak v. King-Emperor*⁹. An intermediate view stands revealed in certain rulings which have held that in a case the accused is not represented by counsel, failure to comply with section 256 (1) cannot be cured under section 537. Typical of that line of cases is the decision in *In re Raju Achari*¹⁰.

Section 256 (f) states: "If the accused refuses to plead or does not plead or claims to be tried he shall be required to state at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken." In *Subrahmaniam Ayyar v. King-Emperor*¹¹, it was pointed out by the Privy Council that disobedience to an express provision as to the mode of trial is not a mere irregularity but an illegality which will vitiate the proceedings. In *King-Emperor v. Chhajju*⁷, the opinion was expressed by Kendall, J., that the provisions in section 256 are not provisions relating to the mode of trial and failure to follow them does not amount to more than irregularity in procedure. In that case the accused was not represented by counsel; nor in the case of *Nisar Ahmed v. Emperor*⁸. But in *In re Raju Achari*¹⁰ Jackson, J., explained the scope of the provisions to be that where the accused is represented by counsel from the outset, he may generally be asked under the section to cross-examine forthwith for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse; that if, however, he is asked forthwith, with a view

1. (1867) 2 H.L. 43.

2. (1873) 6 H.L. 223, 235.

3. (1907) 11 C.W.N. 848, 852.

4. (1923) 25 Bom.L.R. 839; A.I.R. 1924 Bom. 264.

5. A.I.R. 1925 Lah. 339.

6. (1925) I.L.R. 6 Lah. 554.

N.I.C.

7. (1926) I.L.R. 49 All. 316.

8. A.I.R. 1939 Pat. 172.

9. (1925) I.L.R. 5 Pat. 110.

10. (1927) 51 M.L.J. 687; I.L.R. 50 Mad. 740.

11. (1901) 11 M.L.J. 233; I.L.R. 25 Mad. 61 (P.C.).

to recalling the witnesses forthwith, fuller reasons will be required, because it is usually convenient to the accused to have an interval in which to study the depositions already on record and discover material for the cross-examination of witnesses; but that if an accused is not represented by counsel reason must be shown for not postponing the question to the next hearing by which time he can have consulted counsel. The learned Judge pertinently asks: "When can it be said that failure of justice has been occasioned by refusing an accused an opportunity to consult a legal adviser? The very difficulty of answering the question would suggest that he should have at least the opportunity to go in for advice. Justice should not merely be done but should also seem to be done. With respect, it may be pointed out that the view of Jackson, J., seems to be the correct one to take. The instant decision holding that the failure of the Magistrate in that case in directing the cross-examination of the prosecution witnesses forthwith without recording any reasons for the same did not vitiate the trial was rendered on different facts; for in that case the accused was represented by counsel who cross-examined the prosecution witnesses without protest against the procedure adopted in refusing an adjournment and directing the cross-examination to be made forthwith.

OFFICIAL TRUSTEE OF BENGAL v. LOUISE CHIPPENDALE, I.L.R. (1943) 2 Cal. 325.

Two questions of great interest in the law of trusts fell to be decided in this case, namely, whether a trust can be created in respect of a fund contingently on the fund subsequently coming into existence and whether the rule as to certainty of subject-matter could be held to be satisfied where the amount in respect of which the trust is constituted is not a liquidated sum at the time of the creation of the trust. The rulings, English and Indian, have made it clear that for such purposes as attachment through a garnishee order, etc., the amount should be a liquidated amount; else it will not be attachable, see *Hall v. Pritchett*¹, *Howell v. Metropolitan District Railway Co.*² In *Sabju Sahib v. Noordin Sahib*³, it was held that for purposes of the Succession Certificate Act, 1889, section 4 (1) (a) there is no debt where there is no obligation to pay a liquidated sum of money. A similar conclusion was reached in *Doraiswami Padayachi v. Vaithilinga Padayachi*⁴ with reference to section 25 of the Indian Contract Act.

In regard to a trust, section 6 of the Indian Trusts Act only requires that the author of the trust should indicate "with reasonable certainty . . . the trust property." In Halsbury's Laws of England⁵ also it is stated that "in order to raise a trust, the property to be affected by it must be either expressly designated or so defined that it is capable of being ascertained." The object of the rule is thus the identification or ascertainment of trust property. A precise or meticulous definition of the same is therefore not essential. It is further stated in Halsbury⁶ that a trust may be declared contingently of a fund on its subsequently coming into existence. In *In re Turcan*⁷, the Court of Appeal in England held that the benefit arising under a contract under which a policy-holder has a right to recover certain sums of money from an insurance office in certain events can validly be made the subject of a trust and that even a covenant in the policy that it should not be assignable will not preclude the settlor from giving the trustees the benefit of the money either when it was received or by executing a declaration of trust. Section 8 of the Trusts Act no doubt lays down that the subject-matter of a trust must be property transferable to the beneficiary and that it must not be merely beneficial interest under a subsisting trust. It is however to be noted that the condition as to transferability must be satisfied only at the time when the transfer under the deed to the beneficiary is to take place and secondly that the bar of a beneficial interest under a trust being the subject of a fresh trust cannot operate where the fresh trust is not of a beneficial interest merely but of the very property which has been received

1. (1877) 3 Q.B. 225.

2. (1881) 19 Ch.D. 508.

3. (1898) I.L.R. 22 Mad. 139.

4. (1916) 32 M.L.J. 422 : I.L.R. 40 Mad.

51 (F.B.).

5. 2nd Edition, Vol. 33, p. 100, para 164.

6. *Ibid.*, p. 165.

7. (1888) 40 Ch.D. 5.

under an earlier trust, see *Pestonji v. Jalbhoy*¹. It looks therefore as if neither the contingent character of the fund nor its being indefinite and unliquidated as to the amount can be a bar to the constitution of a valid trust. This view seems to fit in also with the provisions of the Transfer of Property Act. The definition of an "actionable claim" in section 3 includes "a claim to any debt or to any beneficial interest in movable property whether such debt or beneficial interest be existent, accruing, conditional or contingent" and under section 130 such debt or interest is transferable with or without consideration.

In the case under notice, a settlor—while still in the service of a railway company and as such a member of the Provident Institution of the company—executed, in June, 1928, a deed by which he purported to transfer to two trustees upon certain trusts, "the sum of money to which he would be entitled as a member of the Provident Institution of the company, i.e., Rs. 33,000 or thereabouts, and any other moneys to which on his retirement from the service of the company he might become entitled as a subscriber or member of the company's Provident Institution." The settlor retired in 1935. He received Rs. 72,468 and odd, of which, about Rs. 53,000 were invested in securities. He died in 1939. It was argued that at the date of the settlement the amount payable to the settlor on retirement was not capable of ascertainment and further it was contingent and dependent upon whether the settlor made or continued to make a voluntary subscription in addition to the compulsory subscription, whether the company was able to pay any contribution, etc. On the facts it is clear that there was certainty as regards the origin and nature of the trust property. The uncertainty related to the quantum merely. Between the making of each deposit and the retirement of the member the debt goes on accruing. It is an accruing, conditional or contingent debt and as such can be the subject of a trust as held in *Turcan's case*². Further the amount of a member's credit in the Fund is also a beneficial interest in movable property to which the member is entitled and as such can be the subject of a valid disposition under the provisions of the Transfer of Property Act.

ISHA PRAKASH GANGULI v. A. K. BASU, I.L.R. (1943) 2 Cal. 397.

It is always a question of great nicety whether money provided by a third party and paid to a pressing creditor by a bankrupt is or is not recoverable by the trustee in bankruptcy. One may with respect agree with the statement of Wright, J., in *In re Drucker : Ex parte Basden*³, that "it is not a very easy matter either in point of law or in point of fact to decide." The crucial matter to consider is whether in the circumstances of the particular case the money could be regarded as the bankrupt's. Judicial decisions on this question afford limited assistance only. According to one line of cases, advance of money as and for a specific purpose would *per se* give rise to an implied trust, see *Toovey v. Milne*⁴. In that case a bankrupt desirous of settling with his creditors sent his wife to borrow from his brother-in-law a sum of £120 for that purpose. The money was lent and there was no stipulation for its return if the object failed. In fact the object did fail and the money was returned. In an action by the trustee in bankruptcy to recover the amount, Abbott, C.J., held that the money having been advanced for a special purpose, it stood clothed with a specific trust and carried an implied stipulation that it must be returned to the lender should the purpose fail. In *Edwards v. Glynn*⁵, there was an express stipulation for the return of the money if the purpose failed and therefore it was easy for the Judges to find that the amount stood impressed with a trust. The decision of Herridge, J., in *In re Hooley : Ex parte The Trustee*⁶ followed that in *Toovey v. Milne*³ though the action there was one by the trustee in bankruptcy to recover the amount from the creditor who had accepted payment from the debtor, notwith-

1. (1933) 150 I.C. 474 : 36 Bom.L.R. 42 : A.I.R. 1934 Bom. 64.

2. (1888) 40 Ch.D. 5.

3. (1902) 2 K.B. 55.

4. (1819) 2 B. & Afl. 683 : 106 E.R. 514.

5. (1859) 2 El. & El. 29 : 121 E.R. 12.

6. (1915) 84 L.J. (K.B.) 1415.

standing his having had notice of an available act of bankruptcy by the debtor. A second line of cases would seem to prescribe an objective test and examine the belief of the accepting creditor to determine whether the money in question was only a loan by a third party to the debtor or whether it had been advanced for a specific purpose and therefore stood impressed with a trust. In *re Rogers: Ex parte Holland and Hannen*¹ and *In re Drucker: Ex parte Basden*² fall in that category. In the first of these cases, where the bankrupt seems to have been a curiosity in his way, in that he never used to pay his creditors until they had presented petitions in bankruptcy against him and then paid just to avoid the bankruptcy, the creditor to whom payment was made had more than once been assured that the money paid was not the debtor's but that a friend was finding it. In the latter case it was found that the payment was accepted in the belief that the money was not the debtor's money. The decision in *In re Watson: Ex parte Schipper*³ seems to suggest that, for a trust to be inferred, there should be not only a prohibition by the person advancing the money of its being used for any other purpose but also evidence that the accepting creditor "is told and believes. . . . that the money had come to him in that understanding." Standing apart from the other cases is the ruling in *In re Snyder: Ex parte Pixley*⁴. There after the presentation of a bankruptcy petition against the debtor, with a view to secure an adjournment of the hearing of the petition so as to effect a settlement with the creditors in the meantime, a sum of £1050 was paid by the debtor to the creditor concerned, the amount having been advanced by a third party for that purpose. The object being specified an inference of trust would well be warranted in accordance with the conclusions in *Toovey v. Milne*⁵. Cave, J., however found that the money became the money of the bankrupt and proceeded to observe: "Of course if a third party for some purpose of his own wished a delay and for that purpose was willing to pay a sum to the creditor for that consideration only, it might be a good answer to an application of this kind." This ruling was considered in *In re Rogers: Ex parte Holland and Hannen*¹ as a decision resting on the findings in that case.

In the case under review, money was deposited, after admission of an insolvency petition but before adjudication, by the insolvent under Order 21, rule 39, Civil Procedure Code, to set aside a sale of property held in execution of a money decree passed against him. The money so deposited had been taken from the brother-in-law of the insolvent. It was found that the money had been advanced to him with a view to help him out of his distress. The material facts here were just the same as those in *Toovey v. Milne*⁵. The learned Judges however held that there was nothing to show that the money had been earmarked for the purpose of making a deposit without any liberty to the insolvent to apply it to any other purpose and hence the money could be recovered by the Official Receiver as part of the estate of the insolvent. As was observed of the ruling in *In re Snyder: Ex parte Pixley*⁴, the decision under notice should be treated as one of fact merely, though how far the finding itself is warranted in view of the approximation of facts there to the facts in *Toovey v. Milne*⁵ may remain arguable.

1. (1891) 8 Morrell 243 (C.A.).

2. (1902) 2 K.B. 55; s.c., on appeal (1902) 2 K.B. 237.

3. (1912) 107 L.T. 96; s.c. on appeal 107 L.T. 783.

4. (1891) 8 Morrell 127.

5. (1819) 2 B. & Ald. 683; 106 E.R. 514.

SECRETARY OF STATE FOR INDIA *v.* NAWAL KISHORE, I.L.R. (1943) All: 223.

The chief interest of the above case lies in the emphasis attached to the provisions of section 80 (d) of the Code of Civil Procedure as being mandatory. After its amendment by the Government of India (Adaptation of Indian Laws) Order, 1937, section 80 (d) requires that, where a suit is sought to be brought against the Secretary of State, notice of suit should have been delivered to or left at the office of a Secretary to the Central Government, the Political Secretary, and a Secretary to the Provincial Government of the Province where the suit is to be instituted. The short question that fell to be decided on this requirement was whether a notice of suit served on the Collector of the District where the suit was instituted was sufficient compliance. The cause of action in the instant case had no doubt arisen before the amendment of section 80 but that fact was rightly ignored as the procedure to be followed is only that in operation at the time of the institution of the suit. In *Bhagchand Dagadusa v. Secretary of State*¹, Viscount Sumner had observed: "Section 80 is express, explicit and mandatory and it admits of no implications or exceptions." The noble lord added: "To argue that the plaintiff had a right urgently calling for remedy while section 80 is merely procedural is fallacious." The section imposed a statutory and unqualified obligation on the Court." It falls to be noted that the observation refers to section 80 as a whole and not merely to any part of it. In view of the categorical nature of the observation, in *Venkatarangiah Appa Rao v. Secretary of State*², it was held that it was not open to the Court to make "exceptions or qualifications to the explicit terms of section 80 on account of considerations of hardship and absence of prejudice or detriment to the interest of the Government." In the same case on appeal³, the learned Judges considered Viscount Sumner's observations as to section 80 being mandatory as "*applicable to everything and every condition contained in that section.*" In that view it will be futile to found a distinction between the several limbs of that section, that some of them are conditions precedent requiring strict compliance so as to give jurisdiction to the Court while others are relatively inconsequential whose violation would amount only to a material irregularity that can be condoned or waived. The view found in *Hirachand Himatlal Marwadi v. Kashinath Thakurji Jadhav*⁴ that it is open to a party protected by section 80 to waive his right to notice does not fit in with the principle that a statutory requirement which is imperative cannot be waived. Sir Lancelot Sanderson's observation in *Gaekwar Baroda State Railway v. Hafiz Habib Ul Haq*⁵, in respect of sections 86 and 87 of the Civil Procedure Code that the provisions are statutory and imperative and cannot be waived would seem to be equally apposite in the context of section 80. If the rule barring suit against a foreign prince, etc., was merely one of international law or non-statutory, it may be, that a breach of it can be waived by the party affected. Where however the suit stands statutorily prohibited except when a particular course is pursued, non-pursuit of that course cannot surely be cured by an absence of objection or belated objection by the party concerned. If this approach is correct, it would follow that the rulings in *Purna Chandra Sarkar v. Radharani Dassya*⁶, *Ram Narain Prasad v. Ram Kishun Prasad*⁷ and other similar decisions that delay in objecting to notice under section 80 as being defective may operate as a waiver may require re-consideration. It will also follow that the Government's being only a *pro forma* party to the action will be irrelevant as regards the necessity for strict compliance with the provisions of the section, *Province of Madras v. Maharaja of Jeypore*⁸. As was held in the *Province of Madras v. Vellayyan Chettiar*⁹, where the notice is defective there is no compliance with section 80, which means that the Court has no jurisdiction to try the action. Thus in the instant case, inasmuch as the notice of suit was lodged with the Collector

1. (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338 : I.L.R. 51 Bom. 725 (P.C.).

2. (1930) 59 M.L.J. 923 : I.L.R. 54 Mad. 416.

3. A.I.R. 1935 Mad. 389.

4. (1942) 41 Bom.L.R. 727.

5. (1938) 2 M.L.J. 11 : L.R. 65 I.A. 182 :

N.I.C.

I.L.R. (1938) All. 601 (P.C.).

6. A.I.R. 1931 Cal. 175.

7. A.I.R. 1934 Pat. 354.

8. (1943) 1 M.L.J. 33.

9. (1944) 2 M.L.J. 65.

and not with the persons on whom it had to be served under section 80, there was no compliance with the section and hence the Court had no jurisdiction to entertain the suit.

KALLIAN RAI v. KASHI NATH, I.L.R. (1943) All. 307.

It is a narrow point that fell to be decided in this case which holds that so long as a widow does not claim a partition under section 3 (3) of the Hindu Women's Rights to Property Act, 1937, the status of a joint Hindu family continues and the son of a payee under a promissory note can sue on it without making the payee's widow a party to the suit. The same conclusion had been reached in Madras in *Satyanaarayana-charlu v. Narasamma*¹, on similar facts and on practically the same lines of reasoning. Both decisions suggest that though the widow may not be a coparcener she is yet a member of a joint Hindu family so long as she does not call for partition and as such her son can as manager bring a suit on behalf of the joint family of which she is a member. Dicta as the status of a widow under section 3 (2) of the Act are conflicting. Some suggest that the widow becomes a coparcener. Thus in *Saradambal v. Subbaramu Aiyar*², Venkataramana Rao, J., observed that "she is conferred the same status as that of a male owner." In *Rosamma v. Chenchiah*³, Mockett, J., remarked that "there is nothing whatever in the Act which suggests that the Hindu widow does not acquire the status of a coparcener." This view to some extent derives support from the conclusion in *Chinniah Chettiar v. Sivagami Achi*⁴ that the widow takes a fluctuating share under the Act and she will be entitled only to that interest which her husband had he been alive would have taken on the date of the partition, no matter when he died. A definition of the widow's position differently is to be found in *Natarajan Chettiar v. Perumal Ammal*⁵, where Horwill, J., said: "She was not a coparcener before her husband's death and she was not one afterwards." An intermediate view has been taken in the instant case on this matter. Some of the problems depending on a precise definition of the widow's position under the Act and the desirability of having an authoritative elucidation of her status have been adverted to in (1944) 2 M.L.J. pp. 5-7 (N.I.C.).

In the case under review the question was one that fell to be disposed of without much difficulty. Even if it be that the widow under section 3 (2) of the Hindu Women's Rights to Property Act becomes only a tenant-in-common with the coparceners of her husband, the manager of the family will still be competent to represent her in litigation. Authority is afforded by the rulings in *Bemola Dossee v. Mohun Dossee*⁶ and *Sukhadakanta Bhattacharjya v. Jogineekanta Bhattacharjya*⁷, which related to cases of Dayabhaga joint families. In *Lingan Gowda v. Basan Gowda*⁸, Lord Phillimore stated: "In the case of a Hindu family where all have rights it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action or bring an action by his guardian before; and in each of these cases therefore, the Court looks to the explanation 6 to section 11 of the Code of Civil Procedure to see whether or not the leading member of the family has been acting on behalf of minors in their interest, or if they are majors with the assent of majors." Such assent could certainly be presumed from the very fact that one of the members of the family is permitted to be in management of the family estate by the other members of the family, see *Sukhadakanta Bhattacharjya v. Jogineekanta Bhattacharjya*⁷. These principles would indicate that even if the widow under section 3 (2) of the Hindu Women's Rights to Property Act acquires only the status of a tenant-in-common she could effectively be represented by the manager of the joint family in litigation appertaining to the family and be bound by its result. *A fortiori* if her status is that of a coparcener.

1. (1943) 2 M.L.J. 282.

2. (1941) 2 M.L.J. 862 : I.L.R. (1942) Mad.

3. (1943) 2 M.L.J. 172.

4. (1944) 2 M.L.J. 262.

5. (1942) 2 M.L.J. 668.

6. (1800) I.L.R. 5 Cal. 792.

7. (1933) I.L.R. 60 Cal. 1197.

8. (1927) 52 M.L.J. 472 : L.R. 54 I.A. 122 : I.L.R. 51 Bom. 450 (P.C.).

INAMULLAH v. MUHAMMAD IDRIS, I.L.R. (1943) All. 580.

A somewhat piquant situation tending to obscure the real issue is to be noticed in this case where the scope of Order 21, rule 86 of the Civil Procedure Code fell to be considered. The effect of failure on the part of the purchaser to pay the full amount of the purchase money payable by him into Court, before the Court closes on the fifteenth day from the auction sale of the property under Order 21, rule 85, is set out in rule 86. That rule prescribes that in default of payment within the period mentioned in the preceding rule, the deposit (made under Order 21, rule 84) may if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government and the property shall be re-sold. Three conflicting views have emerged in regard to the scope of this rule. According to one view the Court is not bound to order the property to be re-sold on default of payment; the Court has a discretion to do so or not and can extend the time for making the deposit, *Basawan Dube v. Anpurna Kunwar*¹. If the Court so extends the time for deposit, according to a decision of the Madras High Court, "probably it is an irregularity only and does not render the sale a nullity," *Subramaniam Nimbudiri v. Vykunda Kammathi*². A second view is that the Court cannot accept the deposit beyond the time specified in Order 21, rule 85, and that the discretion under rule 86 is confined to forfeiture and not to the re-sale of the property, *Nawal Kishore v. Buttu Mal*³, *A. R. Davar v. Jhinda Ram*⁴, *Monni Aidruz v. Mira Mohideen*⁵. A third and intermediate view is that time can be extended beyond the period allowed for making the deposit with the consent of all the parties concerned, *Radha Kishan v. Hari Singh*⁶, *Kalpada Mukherji v. Basanta Kumar Datta*⁷. According to the last decision when by consent the balance of the purchase money was received on a date to which the period provided by Order 21, rule 85 was extended and the procedure prescribed in default of such payment was not followed and no re-sale was held, though it is true that section 148 would not authorise the enlargement of the period as the period is one fixed by the statute and not one fixed by the Court, still by reason of the consent of the parties the irregularity in the procedure is waived and the old sale should in the circumstances be viewed as a new sale. With respect, it is submitted that the second view alone seems to be correct. The provision as to the time within which the deposit is to be made being express, explicit, and statutory should be regarded as imperative. Acceptance of deposit outside that time cannot be construed as an irregularity in "publishing" or "conducting" the sale within the meaning of Order 21, rule 90, as the words "publishing" or "conducting" the sale can have reference only to proceedings that take place till the sale is actually held and cannot cover what takes place after the 25 per cent. deposit is made, *A. R. Davar v. Jhinda Ram*⁴. It is also significant that while in regard to forfeiture of deposit, rule 86 uses the word "may," in regard to the holding of a re-sale the word employed is "shall." Further the decisions propounding the first view stand either repudiated or not followed in the very Courts where they were rendered, see *Nawal Kishore v. Buttu Mal*³, *Monni Aidruz v. Mira Mohideen*⁵. Above all the second view alone would seem to be in consonance with the spirit of the Privy Council rulings on other provisions of the Code, that where the provision is statutory and explicit there can be no room for either exceptions or implications, *Bhagchand Dagadusa v. Secretary of State*⁸, *Gaekwar Baroda State Railway v. Hafiz Habib Ul Haq*⁹.

In the instant case, while the purchaser had not made the deposit in time, the judgment-debtor had first filed an application under Order 21, rule 90, and later an application under rule 89 making the necessary deposit and withdrawing the first application. The later application had however been filed out of time and no relief could therefore be given thereunder. But in the view that default

1. A.I.R. 1929 All. 509.

2. (1922) 43 M.L.J. 477.

3. (1935) I.L.R. 57 All. 658.

4. I.L.R. (1938) Lah. 97.

5. (1938) 2 M.L.J. 833.

6. A.I.R. 1927 Lah. 337.

7. (1932) I.L.R. 59 Cal. 117 at p. 127.

8. (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338 : I.L.R. 51 Bom. 725 (P.C.).

9. (1939) 2 M.L.J. 11 : L.R. 65 I.A. 182 : I.L.R. (1938) All. 601 (P.C.).

by the purchaser to deposit the purchase money in time avoids the sale in his favour, a re-sale of the property must be held. Since however the judgment-debtor had deposited the entire decree amount in Court when he filed his application under Order 21, rule 89 that amount stood appropriated to the decree there was nothing outstanding for execution to proceed and therefore no re-sale could be held.

MEWA RAM v. KARAN SINGH, I.L.R. (1943) All. 745.

An intriguing question was decided in this case where it was held that when a person covenants to do a thing which is lawful and does all that was required of him under the covenant but its continuance is prevented by a subsequent enactment of the Legislature he cannot be compelled to refund any sum received by him under the contract which when made was perfectly valid. A certain landholder had, after ejecting his tenant from the holding, accepted nazarana from a person whom he had inducted into possession subsequent to the eviction and conferred occupancy rights on him. The newcomer was actually able to have enjoyment of the holding for three years only, when, as the result of an Act of the U. P. Legislature the ejected tenant became entitled to occupancy rights in the holding from which he had been ousted in the first instance. Thereupon the disappointed new tenant brought an action claiming refund of the nazarana he had paid to the landlord. Reliance was placed on section 65 of the Contract Act. A lease no doubt carries with it a covenant for quiet enjoyment for the duration. And at the time the suit contract was entered into the landlord was certainly in a position to confer occupancy rights. In the circumstances, section 65 of the Contract Act seems inapplicable. The section adverts to void covenants only. A repealed covenant is not synonymous with a void covenant. Further the landlord had done all that he should do under the terms of the contract. The question then arises whether a guarantee against Acts of the Legislature can be read into a covenant for quiet enjoyment. As remarked by Lord Atkin in *Bell v. Lever Brothers, Ltd.*¹, "nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made, by importing implications which would appear to make the contract more businesslike or more just." Persons in general are taken to contract with reference to the existing law only and cannot be taken to have provided by implication against impossibility of performance arising by reason of an Act of the Legislature subsequent to the contract, see *Newington Local Board v. Cottingham Local Board*², *Metropolitan Water Board v. Dick*³. In *Merwanji Mancherji Cama v. Syed Sirdar Ali Khan*⁴, Fulton, J., held that a guarantee against future Acts of the Legislature cannot be implied in a covenant for quiet possession. An approximation to the facts in the instant case is to be found in *Devi Dayal v. Baini Ram*⁵. In that case a person had entered into a contract to print certain advertisements in 60,000 copies of a paper in a particular year. An advance of Rs. 660 was paid. All the copies were actually printed and some 56,550 copies had been sold. The copies had however been forfeited by Government under the Defence of India Act and rules framed thereunder. Refund of the amount advanced was claimed. It was held that the case cannot be said to come within the purview of section 65 because the defendant had carried out his part of the contract and the loss must therefore lie where it had fallen. Sir George Rankin's observation in *Muralidhar Chatterjee v. International Film Co., Ltd.*⁶, that "where a payment has been made under a contract which has, for whatever reason, become void the duty of restitution would seem to emerge" can refer only to contracts which were either *ab initio* void or which became void subsequently. In the case under notice, at the time of entering into the contract the conferment of occupancy right was within the power of the landlord; nor did the contract subsequently become void because the landlord had carried out his part of it and there was no more to be done by him.

1. (1932) A.C. 161 at p. 226.
 2. (1879) 12 Ch.D. 725.
 3. (1918) A.C. 19.
 4. (1895) I.L.R. 23 Bom. 510.

5. (1918) 51 I.C. 412.
 6. (1943) 2 M.L.J. 369 : L.R. 70 I.A. 35 (P.C.).

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NOTES OF RECENT CASES.

Happell, J.
14th July, 1944.

Venkataramana Rao, *In re.*
Crl. R. C. No. 446 of 1944.
(Crl. R. P. No. 420 of 1944.)

Criminal Procedure Code (V of 1898), section 176—Statements recorded under of witnesses to be examined at the preliminary enquiry—Copies of—Right to.

There can be no objection to the Magistrate granting copies of the statements recorded under section 176 of the Code of Criminal Procedure, of witnesses who are going to be examined at the preliminary enquiry.

Emperor v. Muthiah Swamiyar, I.L.R. 30 Mad. 466, distinguished.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
14th July, 1944.

Nagendrudu and others, *In re.*
Crl. R. C. Nos. 863 and 864 of 1943.
(Crl. R. P. Nos. 809 and 810 of 1943.)

Defence of India Rules (1939), rule 81 (4)—Notification by District Collector requiring licensee for sale of kerosene to give correct receipts to customers, exhibit board notifying the price at which oil was sold and other particulars—Retail dealers who are not bound to take out licenses—Not liable to conviction for contravention of notification.

The Collector of Guntur issued a notification, dated 15th May, 1943, in respect of sales of kerosene oil by which the licensee was to issue to every customer a correct receipt giving the name, the license number, the date of the transaction, the quantity sold, the rate at which the article was sold and the total amount charged and was to keep a duplicate of the same to be available for inspection on demand by any officer authorised by the Collector.

Every licensee was further required by the notification to display and keep in a prominent position in his shop or other place of business a copy of the list of maximum price of kerosene fixed by the Collector and a copy of the correct list of stock held by him.

In a prosecution of a retail merchant dealing in kerosene for a contravention of the notification in that he did not issue receipts for the sale of kerosene and did not exhibit any board notifying the price at which the oil was sold,

Held: The use of the expression "licensee" indicates that it is only persons who have to take a license and who have a license that are to comply with the provisions of the notification. In the absence of any notification or rule framed which would require retail dealers in kerosene to take out licenses the accused cannot be found guilty of contravening the provisions of the notification issued by the Collector.

M. S. Ramachandra Rao and *B. S. Ramachandra Rao* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J.
14th July, 1944.

Sundara Rao, *In re.*
Crl.R.C. No. 282 of 1944.
(Crl.R.P. No. 268 of 1944.)

Railways Act (IX of 1890), sections 59 and 107—Manager of chemical stores allowing dangerous acids to be transported by railway as harmless chemicals—Failure to take precautions required under section 59—Liability—Mens rea—Not necessary.

Where the manager of a chemical firm is grossly negligent in that he allows dangerous acids to be transported by a railway as harmless chemicals and fails to distinctly mark the goods as dangerous on the outside of the packing as required by section 59 of the Railways Act, he is liable to be convicted for an offence under section 107 of the Railways Act. The doctrine of *mens rea* has no application. All that is necessary for the offence to be completed is that the goods should be dangerous and that the provisions of section 59 have not been complied with.

Hearne v. Garton (1859) 121 E.R. 26, distinguished.

C. R. Krishna Rao for T. A. Ramachandra Rao for Petitioner.

The Crown Prosecutor (P. Govinda Menon) on behalf of the Crown.

K.S.

Wadsworth, J.
19th July, 1944.

Revenue Divisional Officer and Land Acquisition Officer,
Tellicherry v. Elia Raja of Chirakkal Kovilagam.
A.A.O. No. 422 of 1943.

Land Acquisition Act (I of 1894), sections 18 to 28—Jurisdiction of the Court under—Limits and nature of—Order of District Judge remanding case to Collector for fresh enquiry—Non-appealability—Interference by High Court in revision.

The jurisdiction of the Court under sections 18 to 28 of the Land Acquisition Act is a jurisdiction to enquire into objections to the Collector's award and to make an award itself after hearing the relevant evidence. The Act does not empower the Court to remand the case to the Collector for a fresh enquiry and for a further award.

Though strictly speaking there is no right of appeal against the order of a District Judge declining to make an award, the order involves a material irregularity in the exercise of the special jurisdiction and can be interfered with in revision.

The Government Pleader (K. Kuttikrishna Menon) for Appellant.

D. Ramaswami Aiyangar for Respondent.

K.S.

Mockett, J.
21st July, 1944.

Periyandeva Chetty, *In re.*
Crl.R.N. Nos. 243 and 1512 of 1944.
(Crl.R.P. No. 231 of 1944.)
(Taken up No. 5 of 1944.)

Criminal Trial—Charge of receiving stolen goods—Evidence—Necessity of proof that goods were recently stolen.

In order to show that a man is guilty of receiving stolen goods it is essential that it must be proved that the goods were recently stolen.

B. T. Sundararajan for Petitioner.

The Crown Prosecutor (P. Govinda Menon) on behalf of the Crown.

K.S.

Happell, J.
26th July, 1944.

Rajammal, *In re.*
Crl.R.C. No. 355 of 1944.
(Crl.R.P. No. 338 of 1944.)

Criminal Procedure Code (V of 1898), section 488—"Maintenance" of illegitimate children—Quantum—Not limited to cost of food, clothing and lodging—Cost of education to be considered in fixing amount.

It cannot be said that maintenance is not intended to go further than to ensure to the wife or children food, clothing and lodging. The cost of education, etc., can be taken into consideration in fixing the amount of maintenance of illegitimate children.

Mt. Kumli v. Emperor, A.I.R. 1925 All. 73, disapproved.

G. Gopalaswami for Petitioner.

K. Kalyanasundaram for Respondent.

K.S.

Happell, J.
28th July, 1944.

Appukutti Chettiar, In re.
Crl. R. C. No. 324 of 1944.
(Crl. R. P. No. 308 of 1944.)

Defence of India Rules (1939), Rule 81 (2) and (4)—Order of District Collector prohibiting export of chillies outside the District without permit—Absence of provision in the order for confiscation of goods exported in contravention of the Order—Confiscation of goods exported in contravention of the order—Confiscation under section 517 of the Criminal Procedure Code (V of 1898)—Not permissible—Defence of India Act (1939), section 3—Applicability.

On the 16th July, 1943, the Collector of Coimbatore made an order under rule 81 (2) of the Defence of India Rules prohibiting the export of chillies from any place within the district to any place outside the limits of the district except under and in accordance with the terms of a permit from that District Collector or any other officer specially authorised by him in that behalf. An amendment of that order was issued on 29-6-1944 providing that the Court might order confiscation of property in respect of which the Court is satisfied that the order has been contravened. In respect of an attempt on 12-10-1943 to export chillies in contravention of the District Collector's order the accused was convicted and the cart load of chillies was directed to be confiscated. On revision.

Held, that in view of the provisions of section 3 of the Defence of India Act, section 517 of the Criminal Procedure Code being inconsistent with rule 81 (4) of the Defence of India Rules, the Magistrate has no jurisdiction to pass an order confiscating the property under section 517 of the Criminal Procedure Code. Rule 81 (4) does make provision for confiscation and confiscation may be ordered by the Court only if the order of the District Collector so provides.

Emperor v. Gulamali Bin Hussain, 43 Bom.L.R. 872, relied on.

Narasimha Chettiar v. Emperor, 1943 M.W.N. 180 (Cr.), distinguished.

G. R. Jagadisan and J. R. Akwar Naidu for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Mockett, O.C.J. and Kuppuswami Ayyar, J.
1st August, 1944.

Shaw Omadchand Kashiram & Co.
v. Haji Sattar Hajr Peer Mahamed.
O.S. App. No. 49 of 1943.

Contract—Sale of goods—Breach by buyer repudiating the contract—Damages—Measure of—Absence of evidence of market-value—Recourse to real prices proved about the time of due date—Propriety.

Where in respect of a breach of contract for the purchase of certain goods by the buyer no evidence with regard to the market-rate was given by the buyer, the judge is entitled to fix the amount of damages on such materials as were before him, for instance, on evidence of actual sales about that time. If the market-rate is uncertain, then recourse may be had to such surrounding circumstances as affect the probabilities and among them to real prices proved about the time of the due date. The Judge is entitled on evidence of actual sales on the 31st December to find that it was reasonable to infer that on the 29th of December (the date of the breach of contract) the market-rate was the same as on the 31st.

Shridar v. Gordandas, I.L.R. 26 Bom. 235 at 239, relied on.

B. Sitarama Rao and Messrs. Mehta & Tarwady for Appellant.

S. Srinivasaraghavan for Respondent.

K.S.

King and Bell, JJ.
3rd August, 1944.

Subba Reddi and others. Petitioners.
Crl. R. C. No. 15 of 1944.
(Crl. R. P. No. 14 of 1944.)

Special Criminal Courts (Repeal) Ordinance XIX of 1943—Paragraph 3—Convictions and sentences by special magistrate appointed under Ordinance II of 1942 in trial which ought to have been by a jury—Validity of.

A special magistrate appointed under Ordinance II of 1942, found 12 accused persons guilty of various offences of rioting, arson and dacoity all of which he held to have been committed. Before an appeal preferred against the conviction was heard by the Sessions Judge, Ordinance II of 1942, had been repealed by Ordinance XIX of 1943, and under the provisions of the Repealing Ordinance the appeal came before the Sessions Judge of the District who set aside the conviction of six of the accused and confirmed the conviction of the remaining six.

On appeal by the persons whose conviction was affirmed it was contended that the provisions of Ordinance XIX of 1943, cannot apply to the trial by the Special Magistrate as that trial was under Ordinance II of 1942, which had been declared *ultra vires* by the Federal

Court and therefore the convictions were invalid. It was argued that because Ordinance XIX of 1943 in paragraph 3 does not refer to a jury at all but deals only with trials by a Sessions Judge or an Assistant Sessions Judge all cases in which trials ought to have been before a Sessions Judge by a jury have been omitted from the scope of the Ordinance and therefore the sentences passed at such trials cannot be validated.

Held, negating the contention, that reading the Criminal Procedure Code as a whole there is no warrant for the argument that a trial before a Court by jury is necessarily a trial which is not held by a Judge. Accordingly paragraph 3 of Ordinance XIX of 1943 has the effect of validating the sentence passed by the Special Magistrate in this case.

Roland Braddell, A. S. Sivakaminathan and S. Venkatachalam for Petitioners.

The Assistant Public Prosecutor (N. Somasundaram) on behalf of the Crown.

K.S.

King and Bell, JJ.

7th August, 1944.

Suryanarayana and others, *In re*.

Crl.R.C. Nos. 885, etc., of 1943.

(Crl.R.P. Nos. 831, etc., of 1943.)

Special Criminal Courts (Repeal) Ordinance XIX of 1943, paragraph 3 (1) and (2)—Appeal against conviction in trial under Ordinance II of 1942—Objection to validity of trial on the ground that it was not in accordance with Criminal Procedure Code, not open.

In an appeal under Ordinance XIX of 1943 against a conviction under Ordinance II of 1942, it was argued that anything which Ordinance XIX of 1943 may have said in paragraph 3 (1) is subject to the paramount right granted in paragraph 3 (2) of filing an appeal, and that when once an appeal has been filed every possible point was open to the appellant. It was contended that the trial before the Special Magistrate was illegal and not in accordance with the Code of Criminal Procedure and therefore the sentences should be set aside and a retrial ordered.

Held, that the Repealing Ordinance provides that the sentence by the Special Court under Ordinance II of 1942, shall have effect and continue to have effect subject to a right of appeal, as if the trials had been duly held under the Code of Criminal Procedure, and the right of appeal is also given subject to the same proviso. Accordingly a contention that the trial was not in fact held under the provisions of the Code of Criminal Procedure and was therefore invalid was not open to the accused in the appeal.

K. S. Jayarama Aiyar, C. K. Venkatanarasimham and V. Suryanarayana for Petitioners.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

K.S.

Horwill, J.

7th August, 1944.

Alamelu Ammal v. Rangai Goundar.

C.R.P. No. 1866 of 1943.

Stamp Act (II of 1899), Article 49 (b)—Scope—Promissory note undertaking to pay a sum within two years—Stamp duty payable on—Section 35 (a) of Stamp Act—Applicability.

A promissory note worded "I shall pay to you or to your order within two years the said sum . . ." was stamped with two one anna stamps which would be correct only if the promissory note was one payable on demand. On a contention that the document was really a promissory note payable on demand,

Held, that inasmuch as under the document the debtor was given two years' time within which to pay the debt and within that time the promisee could not enforce the debt, the promissory note is not one payable on demand and therefore not correctly stamped.

The definition of a promissory note in the Stamp Act is much wider than in the Negotiable Instruments Act. According to Article 49 of the Stamp Act, which deals with the duty payable on promissory notes, a sum of one anna, two annas, or four annas should be affixed to a promissory note payable on demand. The second part of that Article refers to all other promissory notes and therefore includes not only those instruments which are promissory notes only under Stamp Act but also those documents which are promissory notes under the Negotiable Instruments Act but which are not payable on demand. A promissory note like the suit document which is payable after two years would therefore come within the scope of Article 49 (b); and the duty payable on such an instrument would be the same as on a bond, because it is payable more than one year after the execution of the note.

Although the duty payable on the suit note is the same as that on a bond, the document is in fact a promissory note and therefore cannot be admitted in evidence even on payment of the penalty under section 35 (a) of the Stamp Act.

T. V. Ramanatha Aiyar for Petitioner.

S. Ramachandra Aiyar for Respondent.

K.S.

Shahabuddin, J.
8th August, 1944.

Sundararamaraju v. Lakshmiddevamma.
A.A.A.O. Nos. 156 and 157 of 1943.

Practice—Second appeal—Finding of fact—Finding that a settlement was executed by a debtor with intent to defeat or delay creditors—Soundness of conclusion from—Question of law which can be interfered with in second appeal.

Though a finding that a settlement was executed by a debtor with intent to defeat or delay his creditors is one of fact which cannot be questioned the soundness of a conclusion from that fact, which was in question, is a matter of law open to interference in second appeal.

I.L.R. 20 Cal. '93, relied on.

P. Satyanarayana Rao for Appellant.

V. Viyyanna for Respondent.

K.S.

Horwill, J.
9th August, 1944.

Annamma v. Kanakamma.
C.R.P. No. 1091 of 1943.

Madras Village Courts Act (I of 1889), section 73—Petition to District Munsiff under—Scope of jurisdiction of Munsiff in revision.

The District Munsiff can interfere under section 73 of the Madras Village Courts Act with the decision of a Panchayat court, only on one of the grounds mentioned therein. He is not at liberty to reconsider the evidence as if he were a Court of Appeal and interfere in revision because he comes to a conclusion on a question of fact different from that of the Panchayat court. Where a Panchayat court has come to the conclusion on the evidence adduced that the suit was not barred by limitation the District Munsiff has no jurisdiction to interfere.

B. V. Viswanatha Aiyar and D. Munikanniah for Petitioner.

Respondent not represented.

K.S.

Happell, J.
9th August, 1944.

Sundararajulu Naidu, In re.
Crl.R.C. Nos. 994 of 1943 and 115 of 1944.
(Crl.R.P. No. 936 of 1943 and 108 of 1944).

Criminal Procedure Code (V of 1898), section 488—Wife whose petition for maintenance has been rejected—Cannot get maintenance by a subsequent petition based on the same evidence and allegations.

Though a wife, whose petition for maintenance has been rejected is not precluded from filing a fresh petition, a Magistrate cannot grant maintenance to her when another Magistrate has already dismissed a petition by her based on exactly the same evidence and allegations, on the ground that they were insufficient to justify the grant of maintenance:

The petitioner in person.

S. S. Rajagopalan and T. K. Rajagopalan for Respondent.

The Crown Prosecutor (P. Govinda Menon) on behalf of the Crown.

K.S.

Horwill, J.
11th August, 1944.

Satyanarayana v. Narayanamurthy.
C.R.P. No. 1092 of 1943.

Trusts Act (II of 1882), sections 73 and 74—Removal of trustee who is "unfit"—Suit if necessary.

Section 73 of the Trusts Act was not intended to deal with questions requiring an elaborate inquiry, but with matters that could suitably be disposed of in a summary inquiry. Where from the documents on record it is clear that the trustee in question had committed breaches of trust and was therefore not fit to continue, the Court can apply sections 73 and 74 of the Trusts Act.

A.I.R. 1943 Sind 223 and A.I.R. 1930 Sind 41, relied on.

In such a case a suit is not necessary.

D. Narasaraju for Petitioner.

V. Viyyanna for Respondent.

K.S.

Kuppuswami Ayyar, J.
11th August, 1944.

Subbayya v. Govindamma.
A.A.A.O. Nos. 232 and 233 of 1943.

Compromise—Suit for maintenance by wife against husband—Compromise by which husband and wife were to live together and in case of disagreement husband to pay maintenance at certain rate to wife—If opposed to public policy—Executing Court if can go into the validity of compromise decree.

N R C

A suit filed by a wife against her husband and his brother for maintenance ended in a compromise and a decree was passed under which it was agreed that the husband and wife should live together and that in case of any disagreement between them the husband should pay maintenance at a certain rate to the wife. After the compromise they lived together for about 4 years and on account of subsequent disagreement the wife began to live separately. She took out execution and sought to have the charged properties brought to sale for the realisation of the maintenance due to her. The husband contended that the compromise decree could not be executed against him as being opposed to public policy.

Held, (i) The question as to whether a compromise is lawful or not is a question which the Court recording the compromise was competent to decide. The decision of the Court recording the compromise impliedly holds the agreement to be lawful and the executing Court is barred by *res judicata* from questioning the lawful character of the agreement.

(ii) In view of the fact that the compromise agreement was for the purpose of effecting a reconciliation between the couple who were living apart, it could not be said to be one in contravention of public policy, merely because there was a term regarding future separation. Accordingly the compromise was not illegal and execution cannot be resisted.

A. Lakshmayya for Appellant.

Suryanarayana for Respondent.

K.S.

Shahabuddin, J.

11th August, 1944.

Pattabhiramayya v. Subba Rao and others.

C.R.P. No. 857 of 1943.

Specific Relief Act (I of 1877), section 30 and Registration Act (XVI of 1908), section 49, Proviso—Applicability—Unregistered award relating to immovable property—Suit to enforce—Cannot be allowed as suit for specific performance treating the award as a contract.

An award relating to a dispute under a lease though registrable under section 17 of the Registration Act was not registered. It was contended that the fact that it has not been so registered did not make it inadmissible in view of the proviso to section 49 of the Registration Act which runs as follows: "Provided that the unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act."

It was contended that the award should be considered to be on the same basis as a contract and in that sense the proviso was applicable to the present case.

Held: that an award is not a contract and cannot be made admissible in evidence and the suit cannot be treated as one for specific performance of the contract.

D. Narasimhan for Petitioner.

P. Somasundaram and P. Suryanarayana for Respondent.

K.S.

Happell, J.

24th August, 1944.

Rathnam Pillai, In re.

Crl.R.C. No. 442 of 1944.

(Crl.R.P. No. 416 of 1944).

Borstal Schools Act (V of 1926), section 8—Sentence of less than two years' detention cannot be imposed—No provision in the Act for sentences to be served consecutively.

Under section 8 of the Borstal Schools Act, a sentence of less than two years' detention cannot be imposed and the Act makes no provision for sentences to be served consecutively.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

Accused not represented.

K.S.

King and Bell, JJ.

29th August, 1944.

Manavedan v. Mahadevi.

A.A.O. No. 268 of 1944.

Civil Procedure Code (V of 1908), section 47 and Order 40—Dismissal of one receiver with intention of appointing a successor—Not a matter falling within section 47, Civil Procedure Code—Order not appealable.

The dismissal of a receiver by a Court not for restoring property to the possession of any of the parties but with a view to appoint a successor to the receivership is not a matter falling within section 47, Civil Procedure Code. No appeal lies against such order.

K. Kuttikrishna Menon and C. S. Swaminathan for Appellant.

D. A. Krishna Variar and T. S. Narasinga Rao for Respondent.

K.S.

Chandrasekhara Ayyar, J.

11th August, 1944.

Co-owners—One co-owner in possession realising entire rents of joint property—Not a trustee liable to account to the other for what might and ought to have been received—Not liable for interest on the share of the rents collected—Trusts Act (II of 1882), sections 94, 95 and 23.

Where all that is established is that the plaintiff and the defendant were co-owners of a building which was rented out from time to time as a shop by the defendant, the latter is not the trustee for the plaintiff merely because he is in enjoyment of the joint property and collects the entire rents and profits himself. The defendant will therefore be liable only for the plaintiff's share of the rents of the house actually received and cannot be made liable for what he might and ought to have received. There is no liability for interest under section 94 of the Trusts Act though the defendant was in possession of the property not having the whole beneficial interest therein. That alone will not constitute a breach of trust as contemplated by section 23 of the Trusts Act in which event alone interest will become payable.

K. Umamaheswaram for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Kuppuswami Ayyar, J.

18th August, 1944.

S. Viswanatha Iyar v. E. V. Kalyanarama Iyar.

S.A. No. 1638 of 1943.

Constructive res judicata—Execution proceedings—Order for attachment—Implied effect—Subsequent dismissal of execution petition for non-payment of batta—Fresh execution application—Right of petitioner to execute—If can be questioned by the judgment-debtor.

When an order is passed in execution directing attachment of the properties of the judgment-debtor, there is an implied finding that the petitioner at whose instance the order in execution was passed was entitled to execute the decree. The fact that the order directing execution does not 'fructify' and the petition is eventually dismissed for non-payment of batta could not stand in the way of the previous order in execution operating as *res judicata*. It is unnecessary in such cases that there should be an express decision. As a decision which must be implied will also operate as *res judicata* the judgment-debtor is barred by *res judicata* from raising in any subsequent execution application the plea of the right of the applicant to execute the decree.

A. V. Viswanatha Aiyar for Appellant.

T. R. Ramachandra Aiyar for Respondent.

V.S.

The Chief Justice and Shahabuddin, J.

23rd August, 1944.

Ismail Abdulla Sait, In re.

Crl. R.C. No. 333 of 1944.

(Crl. R.P. No. 317 of 1944.)

Madras Prevention of Adulteration Act (III of 1918), section 12 (2)—Goods seized in respect of a charge of selling adulterated coffee—Power of magistrate to order it to be destroyed.

On a charge of selling adulterated coffee, the goods seized can be ordered by the magistrate to be destroyed irrespective of the conviction or acquittal of the accused. Under section 12 (2) of the Madras Prevention of Adulteration Act, whether or not a complaint is laid before a magistrate of any offence under the Indian Penal Code or under the Madras Prevention of Adulteration Act, if it appears to the Magistrate on taking evidence that an article is adulterated or other than what it purports or is represented to be, he may *inter alia* order it to be destroyed.

V. Rajagopala Mudaliar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

K.S.

Happell, J.

24th August, 1944.

Meenakshi Ammal, In re.

Crl. R.C. No. 350 of 1944.

(Crl. R.P. No. 334 of 1944.)

Penal Code (XLV of 1860), section 425—Demolition of well platform by usufructuary mortgagee—When mischief.

The damage caused by the demolition of a well platform by a usufructuary mortgagee of the house and compound including the well would not amount to mischief within the meaning of section 425, Penal Code, if the mortgagee had merely removed the platform either by accident or in the ordinary course of enjoyment of the property as usufructuary mortgagee for the more convenient use of the well. But where it is removed only to spite the owner and not in the course of enjoyment, it is mischief within the meaning of the section.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

V.S.

N R C

Somayya, J.
30th August, 1944.

Mohammad Ayisha Beevi v. Samankatna Nadar.
S.A. No. 869 of 1943.

Mahomedan law—Gift—Possession given of bulk of properties—Validity of the entire gift.

Where possession of the bulk of the properties under a gift by a Mahomedan was actually given to the donee, the entire gift will be valid and will confer a title on the donee to sue for possession of the properties which could not be delivered being in the possession of third parties.

Authorities discussed.

S. K. Ahmed Meeran for Appellant.

C. S. Venkatachariar and D. Ramaswami Aiyangar for the 1st Respondent.

K.S.

Horwill, J.
7th September, 1944.

Raja Manuru Venkata Hanumantha Rao v. Ramakrishnayya.
C.R.P. No. 1545 of 1943.

Provincial Insolvency Act (V of 1920), sections 34 (1) and 28 (2)—Scope—Damages for use and occupation of land by the insolvent—Suit for—Leave of insolvency Court not necessary.

Damages for use and occupation are in the nature of unliquidated damages and such damages due by an insolvent would come within the provisions of section 34 (1) of the Provincial Insolvency Act which prohibits the proving of such debts in insolvency and a suit for the same would be maintainable even without the leave of the Insolvency Court under section 28 (2) of the Act.

B. P. Ramanasu for Petitioner.

M. S. Ramachandra Rao for Respondent.

K.S.

Happell, J.
7th September, 1944.

Viswanatha Chetti, In re.
Crl. R. C. No. 539 of 1944.
(Crl. R. P. No. 510 of 1944.)

Food Grains Control Order, 1942—Breach of condition in licence—Offence punishable under rule 81 (4) of Defence of India Rules (1939).

The conditions of a licence under the Food Grains Control Order should be regarded as part of that order itself and any contravention of any one of the conditions would be a contravention of an order made under rule 81 (2) and punishable under rule 81 (4) of the Defence of India Rules.

(1943) 2 M.L.J. 378, followed.

I.L.R. 26 Cal. 571, distinguished.

V. R. Srinivasan for Petitioner.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

K.S.

Happell, J.
14th September, 1944.

Padmanabha Aiyar and another.
Crl. R. C. No. 311 of 1944.
(Crl. R. P. No. 295 of 1944.)

Food Grains Control Order, 1942—License for purchase, sale or storage in wholesale quantities issued under—Condition 6—Applicability to retail sales as well.

Condition 6 of the license for the purchase, sale or storage for sale in wholesale quantities of food grains issued to the first accused, a rice mill owner was as follows:—

"A licensee shall, except when specially exempted by the Provincial Government in this behalf, issue to every consumer a correct receipt or invoice as the case may be giving his own name, address and license number, name, address and license number (if any) of the customer the date of the transaction, quantity sold, price per maund and the total amount charged and shall keep a duplicate of the same to be available for inspection on demand by any authorised officer of Government." The second accused, the son of the first accused, who was managing the rice mill charged Rs. 27, which will be the price at the retail rate for a bag of boiled rice instead of the wholesale rate of Rs. 25 but refused to give a receipt. In a prosecution for breach of condition 6 of the license it was contended that the condition applied only to wholesale sales.

Held, that the condition was applicable to retail as well as wholesale sales by the licensee and both the accused were liable to conviction for breach of the condition.

K. S. Jayarama Aiyar for K. Kulkarni Krishna Menon and R. Sivaraman for Petitioners.

The Assistant Public Prosecutor (N. Somasundaram) on behalf of the Crown.

K.S.

King and Bell, JJ.
9th October, 1944.

Dr. R. G. Rajan v. Srinivasa Naidu.
C.M.P. No. 3853 of 1944.

Court Fees Act (VII of 1870), section 35—Notification of 17th May, 1943 (G. O. No. 5791) reducing court-fee chargeable in a suit for possession or joint possession between trustees or by trustee against ex-trustee—Not applicable to suit between rival claimants to trusteeship.

A suit by two plaintiffs claiming to be trustees of certain trust property against defendants putting forward the same claim, though in a sense a "suit between trustees" does not come within the scope of the notification published in Government Order No. 5791, dated 17th May, 1943 (in execution of the powers under section 35 of the Court Fees Act) reducing to a one-third of the ordinary fee, in the fee chargeable in any suit for possession or joint possession between trustees or between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee. The intention of the Government was to restrict the notification to suits in which the status of the defendant as trustee either at the time of the suit or previously is undisputed.

Where the plaintiffs claiming to be trustees do not concede that the defendants have any right to be trustees they cannot claim that only the reduced court-fee mentioned in the notification need be paid.

R. Sundaralingam for Petitioners.

The Government Pleader (K. Kuttikrishna Menon), on behalf of the Crown.

A. V. Viswanatha Sastri and R. Viswanathan for Respondents.

K.S.

Horwill, J.,
12th October, 1944.

Purushothama Rao v. Satyadri Rao.
S.A. No. 1537 of 1943.

Limitation Act (IX of 1908), sections 19 and 20—Endorsement "towards the amount due under this promissory note, the amounts paid previously have been credited"—Is acknowledgment of subsisting liability that saves time.

An endorsement in the words "towards the amount due under the promissory note, the amounts paid previously have been credited" amounts to an acknowledgment of a subsisting liability and saves limitation. *Venkatachalamiah v. Annapoornamma*, (1942) 1 M.L.J. 469; I.L.R. 1942 Mad. 590 (F.B.) and *Ganesh Narahar v. Dattatraya Pandurang*, I.L.R. 47 Bom. 632, relied on.

It is of little importance whether the endorsement refers to a contemporaneous payment or to a past payment. The endorsement must be construed as saying that certain payments were made in the past towards the promissory note debt and that the remainder of the sum due had still to be paid.

B. V. Ramanasu for Appellant.

K. Kameswara Rao for Respondent.

K.S.

Happell, J.
17th October, 1944.

Annamalai Mudaliar and others, In re.
Crl.R.C. No. 476 of 1944.
(Crl.R.P. No. 448 of 1944.)

Madras City Police Act (III of 1888), section 75—Persons found to have been behaving in a disorderly manner—If should also have been drunk to be convicted under section 75 of the City Police Act.

It is not necessary for an accused person to be both drunk and disorderly in order that a conviction should be made under section 75 of the Madras City Police Act. It is an offence for a person to be found drunk and incapable of taking care of himself and it is also an offence for a person to be guilty of riotous, disorderly or indecent behaviour in any public place. Decision of Horwill, J., in Crl.R.C. No. 55 of 1943, followed.

U. S. Ramaswami Aiyar for Petitioners.

The Crown Prosecutor (P. Govinda Menon) on behalf of the Crown.

K.S.

Shahabuddin, J.
18th October, 1944.

Lakshminarasamma v. Sami and others.
C.M.P. No. 3042 of 1944.

Government of India Act (1935), section 205—Certificate to appeal to Federal Court—Question sought to be raised to be specifically mentioned at the hearing in High Court.

N. R. G.

To consider whether a certificate should be granted or withheld under section 205 of the Government of India Act, there must be something specific mentioned at the hearing with regard to the question sought to be raised on which the High Court could decide whether there is reasonable ground for thinking that that question may be involved.

P. Satyanarayana Rao, T. Ramanurthi and D. V. Reddi Pantulu for Petitioners.
V. Govindarajachari and S. Ramanurthi for Respondents.

K.S.

Happell, J.
 19th October, 1944.

The Public Prosecutor, Madras *v.* Ponnu Goundan.
 Cr. Appeal No. 529 of 1944.

Madras Forest Act (V of 1882), sections 33 and 36—Timber transit rules, rule 2—Transport of seven head loads of fuel in a cart—Liability.

A person found transporting fuel in a cart cannot say that that fuel amounts to so many "head loads" and so escape liability under rule 2 of the Timber Transit Rules. "Head load" in clause (d) of rule 1 postulating the exception clearly refers to a single head load per person.

• The Public Prosecutor (*V. L. Ethiraj*) in person.
P. S. Kailasam for Respondent.

K.S.

Mockett, J.
 20th October, 1944.

Kothukaranan and others, In re.
 CrI. App. No. 623 of 1944.

Penal Code (XLV of 1860), section 300—Attack with knives or sticks by persons with common intention to kill—Death caused by—Conviction for murder—Proper.

In an attack with knives or sticks on an individual, it can seldom be said with certainty who it was that struck the fatal blow or blows. But it can often be said with certainty what the common intention of the assailants was. Where there is a common intention on the part of the assailants to kill, each of the assailants can be convicted for murder though it cannot be shown who dealt the fatal blow.

Public Prosecutor v. Narasingadu, (1937) 2 M.L.J. 490, distinguished.

• Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

• K.S.

Happell, J.
 1st November, 1944.

Venkatasubbier, In re.
 CrI. R. C. No. 838 of 1944.
 (CrI. R. P. No. 786 of 1944).

• *Defence of India Rules (1939), rule 75-A—Provision for requisitioning movable property (paddy) by Grain Purchase Officer—Intra vires—Government of India Act (1935), sections 102 (1) and 299 (2).*

In a prosecution of the petitioners for failure to comply with an order requisitioning their paddy stocks issued by the Grain Purchase Officer a preliminary objection was raised that the provision in rule 75-A of the Defence of India Rules for requisitioning movable property is *ultra vires* the Government of India Act.

Held: The requisitioning of movable property although not specifically enumerated in the Provincial Legislative list is clearly included in more general entries in the list—(in item 27 is included "trade and commerce" within the province and in item 29 "production supply and distribution of goods"). The inclusion of the "compulsory acquisition of land" as a subject in the Provincial Legislative list does not mean that the acquisition of all other kinds of property is excluded. Though section 297 of the Government of India Act restricts the powers of the Provincial Legislatures in regard to matters listed in items 27 and 29 in certain respects, it does not restrict the power to requisition goods within the province. The power of the Provincial Legislature to make laws with respect to trade and commerce within the province and with respect to the production, supply and distribution of goods, includes the power to requisition for public purposes.

V. T. Rangaswami Ayyangar and K. Aravamudhu Aiyangar for Petitioners.

K.S.

The Chief Justice and Clark, J.
1st November, 1944.

Phillip v. Muhammad Siddique Adam.
Referred Case No. 9 of 1944.

Presidency Small Cause Court Rules—Order 21, rules 53 and 32—Execution—Seizure of goods in possession of stranger as belonging to judgment-debtor instead of issuing merely a prohibitory order—Order dismissing claim petition with a finding that the goods belonged to the judgment-debtor—Suit under rule 53 to have the attachment set aside—Necessity for plaintiff to establish title to goods.

Where in execution of a decree goods in the possession of a stranger alleged to belong to the judgment-debtor were seized and not merely attached by means of a prohibitory order as prescribed by rule 32 of Order 21, of the Presidency Small Cause Court Rules and the claim petition was dismissed with a finding that the attached goods belonged to the judgment-debtor, it is essential for the claimant in his suit under Order 21, rule 53 of the Presidency Small Cause Court Rules, to establish his title to possession before he can proceed to have the attachment set aside on the ground of illegality.

R. Rajswara Rao for Applicant.

R. Viswanatha Ayyar for Respondent.

K.S.

Mockett and Kuppuswami Ayyar, JJ.
1st November, 1944.

Ramasubbayya v. Lakshminarasimham.
Appeals No. 267 and 378 of 1943.

Mesne profits—Collection charges on rents—When can be deducted in ascertaining mesne profits—10 per cent. as collection charges—No rule of practice in Madras Courts allowing it.

It is only in cases where the person who has to pay mesne profits had no right to be in physical possession of the land but only to collect rent, it can be said that there would be justification for deducting the collection charges out of the rent collected by him from the tenants in possession, for ascertaining the mesne profits. In a case where the person is entitled to be in actual possession then the mesne profits have to be ascertained with reference to the yield of the land; and the net income after deducting the cultivation charges and other expenses would represent the mesne profits payable to the decree-holder. There is no scope for allowing any deduction for collection charges.

There has been no custom of the people or practice of the Court of any definite percentage (e.g., 10 per cent.) being allowed as collection charges when the mesne profits are fixed with reference to the yield of the land and when the person liable to account for the mesne profits is entitled to be in actual possession of the land.

I.L.R. 62 Cal. 499; I.L.R. 27 Cal. 951, distinguished; I.L.R. 1942 Mad. 562, referred to.

G. Venkatarama Sastri for Appellants.

V. Subramanyam, N. Subramanyam and G. Durga Bai for Respondents.

K.S.

Horwill, J.
1st November, 1944.

Periaswami Pillai v. Nellian Ambalam.
S. A. No. 815 of 1943.

Practice—Suit against a person as sole legal representative—Discovery during course of suit of existence of other legal representatives—Omission to implead them—Effect on decree.

If a suit is brought against certain persons as representatives of an estate and the estate is sufficiently represented by them, then the decree in the suit is valid as against those who are not parties to the suit, if they are omitted from the suit due to ignorance of their existence. [(1941) 1 M.L.J. 580, 30 L.W. 778, 32 Cal. 296 and A.I.R. 1948 Mad. 1199.] The general principle is not affected by the fact that the plaintiff came to know during the course of the suit that there was another legal representative of the estate. If the suit was properly instituted against the estate, it could not cease to be one against the estate because of something that came to the knowledge of the parties subsequently.

R. Gopalaswami Aiyangar for Appellant.

S. Venkatesa Aiyangar for Respondent.

K.S.

Mockett and Kuppuswami Ayyar, JJ.
2nd November, 1944.

Ramanathan Chettiar v. Odayappa Chettiar.
Appeal No. 338 of 1943.

Contract—Indemnity—Release by partner of interest over assets and liabilities of firm on the undertaking that releasee will pay off all partnership liabilities and in case of failure will pay the releasors the loss or damage they might thereby suffer—Sale of releasors' property in execution of a decree against the firm—Amount recoverable under the indemnity is value of the property and not the value for which it was sold in execution.

In settlement of disputes between ex-partners a release was executed by two of them after receiving a cash payment reciting that "the releasors have hereafter no manner of interest over the two firms, its assets, outstandings, properties and liabilities. It is further agreed and declared that if the releasee fails to pay any of the liabilities and thereby the releasors suffer any loss or damage the same shall be paid with reasonable interest by the releasee to the releasors and that the releasee shall keep the releasors indemnified against all claims arising out of the transactions of the said partnership." The releasee having failed to carry out his part of the agreement, immovable properties of the releasors of the value of Rs. 6,000 were sold in execution of the decree against the partnership for Rs. 3,530. In a suit by the releasors claiming under the indemnity clause,

N R C

Held, on the facts, that what the plaintiffs lost was property worth Rs. 6,000 and it is immaterial that it was sold for considerably less. It cannot be said that the value of the property was the amount that it fetched in Court auction and the plaintiffs are entitled to recover the actual value of the property.

Venkataramaniah v. Subramania Aiyar, 17 L.W. 453, applied.

The measure of damages under the indemnity is not the benefit derived by the releasee but the that was caused to the releasors.

R. Subramanyam for Appellant.

S. Venkatesa Aiyangar for Respondents.

K.S.

Wadsworth, J.
2nd November, 1944.

Subbu Naicker v. Perumal Naicker.
A. A. A. O. No. 348 of 1943.

Madras Act (IV of 1938), section 19—Realisation made on 12th November, 1937—Availability in reduction of subsequently scaled down decree even if the payments actually had been made from the properties of other judgment-debtors not entitled to relief.

Realisations made on 12th November, 1937, must be available in reduction of the decree as a whole. And when at a later date certain of the judgment-debtors get the decree scaled down they are entitled subject to the proviso to section 19 of Act IV of 1938 to get credit for the payments made already, even though those payments had actually been made from the properties of other judgment-debtors who were not entitled to relief under the Act.

A. Swaminatha Aiyar for Appellant.

R. Ramamurthi Aiyar for Respondent.

K.S.

Wadsworth, J.
3rd November, 1944.

Vissanna and others v. Appalanarasayya.
A. A. A. O. No. 359 of 1943.

Madras Agriculturists' Relief Act (IV of 1938), section 8, Explanation—Mortgage in favour of A and B superseded by another mortgage in favour of A alone—Second debt not one in favour of "same creditor" and not a renewal of the "earlier" debt.

When a mortgage in favour of A and B is superseded by another mortgage in favour of A alone, the second debt is not in favour of the same creditor as the first and cannot be treated as a renewal for the purpose of the explanation to section 8 of the Madras Act IV of 1938.

B. C. Seshachala Ayyar for Appellant.

E. Venkatesam for Respondent.

K.S.

Happell, J.
10th November, 1944.

Govindarajulu Mudali, In re.
Crl. R. O. No. 605 of 1944.
(Cr. R. P. No. 572 of 1944).

Penal Code (XIV of 1860), sections 186, 326, 143, 148 and 149—Charges under—No complaint under section 195 (1) (a), Criminal Procedure Code in respect of charge under section 186 of the Penal Code—Withdrawal of charge under section 186, Penal Code—No bar to proceeding with the case under the other sections.

In respect of the obstruction of an Amin in the performance of his duties a complaint was filed under sections 186, 326, 143, 148 and 149 of the Indian Penal Code. The charge sheet was however laid in the ordinary way by the police and there was no complaint either by the Amin himself or by the Court to which he was subordinate. When this was brought to his notice the Additional District Magistrate allowed the prosecution to withdraw the case under section 186 of the Penal Code (for which alone a complaint under section 195 (1) (a) of the Criminal Procedure Code was essential) and proceeded with the case in respect of the other sections. On revision,

Held, that where the facts alleged if proved will constitute the major offence of rioting the Court is not debarred from trying the case simply because the facts so alleged divulge that there was also obstruction to a public servant. The offence of rioting, even though the common object was to obstruct a public servant in the discharge of his duties, is not the same as the offence of obstructing a public servant in the discharge of his duties any more than the offence of rioting in order to cause hurt to a person is the same offence as causing hurt to that person. Accordingly there can be no objection to proceeding with the case in respect of the other sections.

Muthuvelu Kudumbam, In re, (1936) 71 M.L.J. 485; I.L.R. 59 Mad. 1083, relied on.

K. Bhashyam and J. R. Gundappa Rao for Petitioners.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

K.S.

Wadsworth, J.
10th November, 1944.

Madras Agriculturists' Relief Act (IV of 1938), section 19—Stay obtained by one judgment-debtor but not followed up by application under section 19—No bar to application for stay by another judgment-debtor under same decree.

It is only in the case of judgment-debtors who are members of a Hindu undivided family [which is treated as a unit for the purpose of section 19 of Madras Act (IV of 1938)] that a stay obtained and not followed up by one judgment-debtor will bar a fresh stay application by another judgment-debtor liable as a member of the same family. There is no such bar where the judgment-debtors are not members of a joint family.

Ch. Raghava Rao for Petitioner.

A. Lakshmayya for Respondent.

K.S.

Mockett, J.
15th November, 1944.

Civil Procedure Code (V of 1908), section 35—Scope—Court returning plaint for presentation to proper Court—Cannot order costs to abide the result of the suit.

Section 35 of the Code of Civil Procedure does not give the Court jurisdiction to direct a Court of equal jurisdiction to make any order as to costs. Accordingly where a plaintiff sues in a wrong Court and that Court returns the plaint for presentation to the proper Court it has no jurisdiction to order that the costs shall abide the result of the suit. The Court returning the plaint must itself order the plaintiff to pay the costs of the defendant.

The Advocate-General (P. V. Rajamannar) and K. Subba Rao for Petitioner.

K. Umamaheswaram for Respondent.

K.S.

Happell, J.
15th November, 1944.

Madras Civil Courts Act (III of 1873), section 13—Suit valued at Rs. 3,100—Subordinate Judge ordering additional ad valorem fee on a valuation of Rs. 5,862-6-2 to be paid—Rejection of plaint on non-payment of additional court-fee—Appeal—Forum—High Court or District Court.

A suit was valued by the plaintiff at Rs. 3,100 but the Subordinate Judge being of opinion that in addition to the fee for the declaratory relief an *ad valorem* fee on a valuation of Rs. 5,862-6-2 had to be paid, gave time for payment of the fee on the value fixed by him and as the fee was not paid, rejected the plaint. In respect of an appeal against the order of rejection,

Held, that the value of the suit must be the plaint valuation and the plaint valuation is the value set on the suit by the plaintiff unless and until his valuation is amended. The valuation as determined by the Subordinate Judge was in dispute and may be varied by the Appellate Court. Accordingly, the valuation given in the plaint and not the disputed valuation governs the forum of appeal. An appeal has therefore to be presented to the District Court and not to the High Court.

Cuniah Chetty v. Venkatanarasiah, (1916) 32 M.L.J. 221 : I.L.R. 40 Mad. 1 (F.B.), applied.

D. Munikanniah for Appellant.

K.S.

Happell, J.
15th November, 1944.

Food Grains Control Order, clause 3(1)—Scope—Mere purchase of food grains in wholesale quantities without licence—Contravention of clause 3 (1) constituting an offence under Defence of India Rules (1939), rule 81 (4).

The mere purchase of food grains in wholesale quantities without a license does contravene clause 3 (1) of the Food Grains Control Order. In order to attract the mischief of the section there does not have to be any combination of purchase, sale or storage for sale. There are three separate prohibitions against undertakings which involve (1) the purchase of food grains in wholesale quantities without a license, (2) the sale of food grains in wholesale quantities without a license and (3) the storage for sale of food grains in wholesale quantities without a license. A mere purchase can be regarded as an engagement in an undertaking which involves that purchase so as to make it an offence punishable under rule 84 (1) of the Defence of India Rules.

C. K. Viswanatha Aiyar for Petitioners.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

K.S.

Wadsworth, J.
16th November, 1944.

Malabar Tenancy Act (XIV of 1930)—Rent—Customary payment by tenant of—"Kozhu panom"—If rent.

Kozhu panom is a fee which the tenant gives for the right of ploughing or reaping. The fee though fixed by custom not in accordance with the extent but at a stabilised annual figure for such lease is

Perraju Pantulu Garu v. Somanna.
C. R. P. No. 184 of 1944.

Gopalakrishnayya v. Subba Naidu.
C. R. P. No. 147 of 1944.

Sriramulu Chettiar & others, *In re*.
S. R. No. 28044 of 1944.

Vadakke Valappil Ammothy and another, *In re*.
Crl. R. C. No. 405 of 1944.
(Crl. B. P. No. 665 of 1944.)

Kalliani v. Raman.
S. A. No. 891 of 1943.

part of the payment made for the use and occupation of land. A *purappad* including such *kozhupanom* would come within the definition of "rent" in the Malabar Tenancy Act.

T. Krishna Rao for Appellant.

K. Kuttikrishna Menon (Government Pleader) for Respondent.

K.S.

King, J.
17th November, 1944.

Narayanaswami v. Venkanna.
C.R. P. No. 572 of 1944.

Provincial Small Cause Courts Act (IX of 1887), section 25—Scope—Order returning plaint to be filed in proper Court—Nature of—Revisability.

An order of the Court holding that it has no jurisdiction to deal with a plaint and calling upon the plaintiff to present the plaint to the proper Court is an order dismissing the suit so far as the Court which passed the order is concerned and if that order is passed for reasons which merit interference in revision there is no ground why the High Court cannot interfere. *Sihal Ram Dutt v. Jagannadha Mazumdar*, 13 C.W.N. 403, distinguished and doubted.

D. Narasaraju for Petitioner.

P. Somasundaram and P. Suryanarayana for Respondents.

K.S.

Howill, J.
17th November, 1944.

Krishnaswami Naicker v. Nalla Goundan.
S. A. No. 135 of 1944.

Registration Act (XVI of 1908), section 74 (a) and (b)—Application to District Registrar for registration of document refused to be registered by Sub-Registrar—Power of District Registrar to dismiss application on the ground that requirements of law (e.g.) the requirements of section 145 (2) of the Madras Estates Land Act had not been complied with—"Requirements of law," not restricted to provisions of Registration Act.

Madras Estates Land Act (I of 1908), section 145 (2)—Hiatus pointed out.

A transferee presented a document for registration to the Sub-Registrar. The transferor was absent and his absence was construed by the Sub-Registrar as a denial of execution. The Sub-Registrar refused to register the document and the transferee invoking the procedure laid down in section 73 of the Registration Act applied to the District Registrar to register the document. The District Registrar without inquiring into the factum of execution under section 74 (a) of the Act held that as the transferee had not complied with the requirements of section 145 (2) of the Madras Estates Land Act the "requirements of law" had not been complied with and dismissed the application under section 74 (b) of the Registration Act. In a suit under section 77 of the Act,

Held, that there is no reason why the term "requirements of law" in section 74 (b) of the Registration Act should be restricted to the requirements of the Registration Act. The term is wide enough to include the whole body of law. The powers of the District Registrar under section 74 are greater than those of the Sub-Registrar and wide enough to refuse to register a document on the ground that it was not in accordance with law. It cannot be said that the District Registrar had no such power as the Sub-Registrar did not have that power.

There appears to be a *hiatus* in section 145 (2) of the Madras Estates Land Act in that a transferor refusing to join in an application would be able to prevent the transferee from effecting compulsory registration; but that is a matter which only the legislature can rectify. The transferee's remedy on refusal of registration is a suit for specific performance.

S. Panchapagesa Sastri and M. R. Narayanaswami for Appellant.

A. G. Sampath Aiyangar for Respondent.

K.S.

Happell, J.
30th November, 1944.

Chittori Potharaju, *In re*.
Ori. R. C. No. 678 of 1944.
(Ori. R. P. No. 641 of 1944).

Hoarding and Profiteering Ordinance (1943), sections 6 (1) and 3 (1)—Sale of beedies at a price more than 20 per cent. above purchase price—Offence—Overhead charges and taxes—Not to be deducted in computing profit.

In a prosecution for contravention of the Hoarding and Profiteering Ordinance by selling beedies at a price more than 20 per cent. above the price for which they were purchased, the accused cannot contend that he was entitled to deduct from the sale price overhead charges and so forth. 20 per cent. is a profit which is clearly intended to cover such charges; nor can the accused deduct the tobacco tax as the tax is paid by the purchaser and the sale price excluded in the particular case such tax. Any plea that higher profits were not unreasonable in view of the normal trade practice should have been pleaded and proved in the trial and the plea cannot be raised in revision.

K. S. Jayarama Aiyar and P. Suryanarayana for the Accused.

The Public Prosecutor (V. L. Ezhiraj) on behalf of the Crown.

K.S.

[END OF VOLUME, 1944—II.]

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1944.

JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1944.

Chief Justice.

The Hon'ble Sir Alfred Henry Lionel Leach, *Kt.* (Barrister-at-Law).

Officiating.

The Hon'ble Sir Vere Mockett, *Kt.*, M.B.E., M.A. (Barrister-at-Law) (from 24th July to 11th August, 1944).

Puisne Judges.

The Hon'ble Mr. Justice Vere Mockett, *Kt.*, M.B.E., M.A. (Barrister-at-Law).

" " A. J. King, *Kt.*, I.C.S.

" " S. Wadsworth, I.C.S. (Barrister-at-Law).

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" " Reginald Clark, (Barrister-at-Law) (from 28th October, 1944).

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" " M. Shahabuddin, I.C.S. (Additional).

Advocate-General.

P. V. Rajamannar, B.A., B.L. (from 10th July, 1944).

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Lanka Venkata Narasimha Sastry Appellant*

v.

Chivakula Veereswara Sastry Sidhanti Respondent.

Easements Act (V of 1882), section 13 (f)—Applicability—Partition of joint well—Right to drain off water falling on one side through the other side—Period of enjoyment, if relevant.

A well which was joint property was partitioned between the plaintiff and the defendant. The plaintiff claimed that he was entitled to drain off the water which fell on his side of the well, through the other side of the well which belonged to the defendant in the same manner in which it was drained prior to the partition and that he must be allowed the right irrespective of the period of enjoyment.

Held, that the right claimed fell within clause (f) of section 13 of the Easements Act. As the easement was apparent and contiguous and necessary, not in the sense of absolute necessity but necessary for enjoying the share of the dominant tenement as it was enjoyed when the partition of the well took effect, it should pass to the owner of the dominant tenement.

Appeal against the decree of the Court of the Subordinate Judge, Cocanada, in A.S. No. 187 of 1941 preferred against the decree of the Court of the District Munsif of Cocanada in O.S. No. 310 of 1940.

B. V. Subramanyam for Appellant.

D. Narasaraaju for Respondent.

The Court delivered the following

JUDGMENT.—The question in this second appeal preferred by the plaintiff, is whether he is entitled to drain off the water falling on the northern side of the well shown as W in the plan through the sluice C to the defendant's southern portion round the well so that it may ultimately pass through the drainage channel D. The District Munsif held that he had this right; but the Subordinate Judge came to a contrary conclusion.

That the right was being enjoyed for 20 years prior to the suit peaceably and uninterruptedly, which is the case put forth in the plaint, has been negatived by the Subordinate Judge for adequate reasons. But he has also held that this is not an easement of necessity, because the plaintiff's house abuts on a street and it should be easy for the plaintiff to carry the water falling on his side of the well to the street.

Easements of necessity are those described in clauses (a), (c) and (e) of section 13 of the Act and illustrations (a), (b), and (m) indicate what are such easements. In this sense, there is no doubt whatever that the easement claimed by the plaintiff is not one of necessity. According to the Subordinate Judge, he has other

means of draining off the water. What is urged however for the appellant is that it is not necessary for giving relief to the plaintiff to find that the easement he claims is one of necessity, as so understood, if, owing to the slope of the land or the configuration of the property, water falling on what has now become his portion has been passing towards the land of the owner of the other half. It is contended that the well was joint property and was partitioned in 1933 according to the defendant. If at that time water was flowing from the northern side of the well to the southern side, he must be allowed the said right, whether the enjoyment was for a short period or a long period. The Subordinate Judge has said that the sluice *C* could have been put up only after 1933 and that the plaintiff's case that the water was flowing through the sluice *C* to *D* for more than 20 years cannot be accepted as true. The answer attempted is that, if water was flowing along *C* in the direction of *D* even previously, this is enough even if the sluice *C* came into existence only when the partition wall was erected in 1933 or thereabouts.

Reliance is placed on section 13 (f) of the Act in support of the plaintiff's right. The right falls within this clause, as it has been held in *Chintakindy Parvatamma v. Lanka Sanyasi*¹ that a drain is an apparent and continuous easement, following some English cases. The same position is stated in Gale on Easements, 11th Edition, at p. 31, where the right to discharge water on to a neighbour's land is spoken of as a continuous servitude as contrasted with a right to draw water from a well which is described as discontinuous servitude. The case for the plaintiff, based on the slope of the property, that water had been flowing, from his side of the well to the defendant's side of the well, which has been accepted by the District Munsif as every probability was in support of it, has not been negated by the Subordinate Judge who concentrated his attention on the existence of the drain *C* for over 20 years, as alleged by the plaintiff in his plaint. Even the defendant did not say in his evidence that water was not flowing from the plaintiff's portion of the well towards his side of the well as the plaintiff stated. He was controverting the plea that the enjoyment was for over 20 years. If the easement is apparent and continuous and necessary, not in the sense of absolute necessity but necessary for enjoying the share of the dominant tenement as it was enjoyed when the partition of joint property took effect, it shall pass to the owner of the dominant tenement. For not viewing the case of the plaintiff from this standpoint, the plaintiff was mostly responsible, as he seems to have urged that he got the right as an easement by way of prescription or as an easement of necessity.

Holding that clause (f) of section 13 of the Easements Act applies to the case, I set aside the decree of the lower appellate Court and restore that of the District Munsif. Each party will bear his own costs here as well as in the lower appellate Court.

Leave refused.

V. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Kaza Sivaramakrishna Rao

Appellant*

v.

Jonnalagadda Seetharamayya and others

Respondents.

Civil Procedure Code (V of 1908), sections 39, 42 and Order 21, rule 10—Mortgage decree—Transfer to another Court for execution—Power to sell properties within jurisdiction of trial Court.

1. (1910) I.L.R. 34 Mad. 487.

When a mortgage decree has been transferred for purposes of execution to another Court within the jurisdiction of which Court part of the mortgaged properties are situate the transferee Court has all the powers of the Court which passed the decree. It can consequently sell the properties lying outside the boundaries of its jurisdiction as well as those lying within them.

Abdul Hafiz Saheb v. Abdul Sukkur Saheb, (1937) 2 M.L.J. 602, approved.

Appeal under clause 15 of the Letters Patent against the judgment and order of the High Court dated 27th July, 1943 and passed in A.A.O. No. 510 of 1942 preferred against the order of the District Court of Kistna at Chilakalapudi dated 21st July, 1942, and made in C.M.P. No. 54 of 1942 in E.P. No. 68 of 1941 in O.S. No. 59 of 1936, Sub-Court, Masulipatam.

P. Satyanarayana Rao for Appellant.

P. Sivaramakrishnaia for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This Letters Patent Appeal raises a question with regard to the powers conferred by section 42 of the Civil Procedure Code on a Court to which a decree has been transferred for purposes of execution. In order to understand what is involved we must set out the facts in this case.

On the 31st May, 1925, the third respondent mortgaged a house belonging to him in Bezvada to the Co-operative Building Society of Bezvada to secure a sum of Rs. 4,000. On the 20th September, 1926, the third respondent and his sons (the fourth and fifth respondents) created a second mortgage on this property in favour of the second respondent and by the same deed a first mortgage on other properties consisting of agricultural lands. Subsequently the Building Society advanced to the third respondent a further sum of Rs. 800 in respect of which it obtained a third charge on the house. The third respondent failed to repay to the Building Society the moneys advanced by it to him and on the 20th December, 1933, the Building Society obtained an award against him. This was executed on the 16th December, 1934, and at the auction the property was purchased by the appellant. In the meantime the second respondent instituted a suit in the District Court of Kistna to enforce the mortgage which the third respondent and his sons had created in his favour on the 20th September, 1926. The District Court had jurisdiction by reason of the fact that the lands in respect of which the second respondent had obtained a first mortgage were situate within the territorial limits of the District Court's jurisdiction. The suit remained on the file of the District Court until the 16th November, 1936, when it was transferred to the Court of the Subordinate Judge of Masulipatam. By that time the second respondent had assigned the mortgage to the first respondent, who became the second plaintiff in the suit.

On the 16th August, 1938, the first respondent obtained from the Subordinate Judge a preliminary decree and on the 13th December, 1940, a final decree. On the 19th March, 1941, the decree of the Subordinate Court was transferred to the District Court of Kistna for execution. As the decree-holder had not obtained an encumbrance certificate in respect of the agricultural lands and as the Court refused to grant him further time for its production, the application for execution was proceeded with only in respect of the house in Bezvada, the sale of which was fixed for the 2nd February, 1942. The appellant became aware of the course of events in January and on the 26th of that month he filed a petition asking for an order directing the decree-holder to proceed first in execution against the lands in the Kistna district. This application was, however, not pressed and was formally dismissed on the day fixed for the sale of the house in Bezvada. The first respondent purchased the property at the auction.

On the 4th March, 1942, the appellant filed an application under O. 21, rule 90, for an order setting aside the sale. He advanced two grounds. The first was that the District Court had no jurisdiction to execute the decree so

far as the Bezwada property was concerned. The second ground was that the proclamation of sale had not disclosed the earlier mortgage in favour of the Building Society. The first respondent contended that the application did not lie because the appellant by filing the application of the 26th January, 1942, had submitted to the jurisdiction of the District Court. All these questions were answered in favour of the appellant. The first respondent appealed to this Court. The appeal was heard by Horwill, J., who was of the opinion that the District Court had jurisdiction to sell the Bezwada property and that the irregularity in not mentioning in the sale proclamation the earlier mortgage in favour of the Building Society had not resulted in substantial loss to the appellant. He agreed, however, with the District Judge that the petition of the 26th January, 1942, did not imply any waiver of the objection to jurisdiction. As the learned Judge was of the opinion that the District Court had jurisdiction to sell the Bezwada property and that the appellant had not suffered any real loss as the result of the omission in the sale proclamation, he allowed the appeal. The present appeal is from this decision.

As we agree with Horwill, J., that the District Court had jurisdiction to sell the house in Bezwada and that the appellant suffered no loss as the result of the irregularity in the publication of the sale proclamation it is unnecessary for us to discuss the question of waiver. We may mention in passing that no argument has been addressed to us on the question of material irregularity. The only substantial question is whether the learned Judge was right in holding that the District Court had all the powers of the trial Court in the matter of execution.

Section 38 of the C. P. Code states that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 39 contains provisions with regard to the transfer of decrees for purposes of execution. Sub-section (1) (c) says that the Court which has passed a decree may on the application of the decree-holder send it for execution to another Court, if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it. Section 42 provides that the Court executing a decree transferred to it for execution shall have the same powers in executing it as if it had been passed by itself. Horwill, J., held that as section 42 gives the Court to which a decree is transferred for execution the same powers for this purpose as the Court which passed it had and as the trial Court had the power to sell in execution the Bezwada property, notwithstanding that it was outside its jurisdiction the District Court also had the power to sell this property.

We agree with this opinion. It is now well-settled law in this Province that a Court which passes a mortgage decree in respect of properties lying within and without its jurisdiction has the power to sell in execution all the properties covered by the decree. That being the law, the District Court by reason of section 42 had the same power as the Subordinate Court of Masulipatam had of selling the house in Bezwada.

In the course of the arguments before Horwill, J., several cases were cited, but only one of them has real application. That case is *Abdul Hafiz Saheb v. Abdul Sukkur Saheb*¹, which was decided by Varadachariar, J., who discussed the powers conferred by section 42 on the Court to which a decree is transferred for execution. The facts there were these. A money decree was passed by the Court of Small Causes at Trichinopoly. It was transferred for execution to the Court of the District Munsif of Trichinopoly as one of the defendants had immovable property within the jurisdiction of that Court. After the transfer, an application was made to the District Munsif to execute the decree by order-

ing the arrest of the second defendant. It was contended that inasmuch as the object for which the decree had been transferred was the attachment of the immovable properties of the first defendant, the District Munsif could not entertain a petition for the arrest of the second defendant. It was held that the District Munsif had power to execute the decree in this way. Having referred to section 38, Order 21, rule 10 and section 42, Varadachariar, J., said that unless in the order of transfer there was express limitation of the purpose for which the decree was transferred—assuming that such limitation could control the provisions of the Code as to jurisdiction—the natural effect of these statutory provisions was to impose no limitation on the Court to which a decree had been transferred for execution. We agree. We can see nothing in section 42 or in any part of the Code of Civil Procedure which restricts in the mode of execution the power of the Court to which a decree has been transferred for execution. This means that when a mortgage decree has been transferred to a Court for execution it can sell the properties lying outside the boundaries of its jurisdiction as well as those lying within them.

The appeal will be dismissed with costs.

B. V. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Vangala Venkateswarlu

*Appellant**

v.

Sivapurapu Hymavatamma

Respondent.

Negotiable Instruments Act, (XXVI of 1881), section 58—Forged endorsement on promissory note—Validity—Party whether can rely on such endorsement.

Although section 58 of the Negotiable Instruments Act does not directly apply to a case of a forged endorsement on a promissory note, the general principle that a forged document is a nullity will apply and a person will not be allowed to rely on the forged endorsement:

Banku Behari Sikdar v. Secretary of State. (1908) I.L.R. 36 C. 239, *Mercantile Bank of India, Ltd. v. D' Silva* (1928) I.L.R. 52 Bom. 810 relied on.

Appeal against the decree of the Court of the Subordinate Judge of Guntur, in A.S. No. 258 of 1940 (A.S. No. 31 of 1940, District Court, Guntur), preferred against the decree of the Court of the District Munsif of Guntur in O.S. No. 75 of 1938.

M. S. Ramachandra Rao and D. R. Krishna Rao for Appellant.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—The findings of fact are that the defendant received a sum of money from P. W. 5 for which she executed a promissory note, Ex. A, dated the 17th January, 1936. An endorsement on the back of the promissory note purporting to endorse the promissory note over to the plaintiff bears the date of the 21st April, 1936; and it is found that that was not the true date of the endorsement, and that it was written merely to avoid the application of Madras Act IV of 1938. The first Court found that the suit was not maintainable, and so dismissed the suit with costs. The lower Appellate Court, while upholding the finding of the District Munsif on questions of fact, found that the mere antedating of the note (despite the circumstances found by the learned Subordinate Judge) did not amount to forgery. The learned Subordinate Judge was prepared to consider the plaintiff—a woman—as an endorsee for collection;

and so he decreed the suit to the extent that would have been permissible had the true owner of the note instituted the suit.

There can be no doubt at all that the endorsement is a forgery. It was made with the fraudulent intention of causing loss to the defendant by making him liable for an amount exceeding that which the law permitted; and as he made this false document with a dishonest intention it was a forgery. There can also be no doubt that although section 58 of the Negotiable Instruments Act does not directly apply to a case of this kind, Courts in India have held that the effect of a forged document in India is the same as in England and it has therefore no legal effect whatsoever. The matter was discussed in *Mercantile Bank of India, Ltd. v. D'Silva*,¹ and decisions of other High Courts, (e.g.) *Hunsraj Purmanand v. Ruttonji Walji*,² *Jai Narain v. Mahbub Baksh*³ and *Banku Behari Sikdar v. Secretary of State*,⁴ were referred to as showing that there was a general consensus of opinion throughout India that a forged document could convey no title. *Banku Behari Sikdar v. Secretary of State*⁴ in particular, dealt with a forged endorsement, which the learned Judge said was a nullity. If the forged endorsement is a nullity, then it will follow that the plaintiff had no title whatsoever to sue and that the only person who could sue on the note was the true owner, P.W.5. The lower appellate Court relied on a decision of Ramesam, J., in *Nallayya Goundan v. Palani Goundan*⁵, a case not unsimilar to the case now under consideration. The learned Judge first considered the effect of section 13, clause 2 of the Bills of Exchange Act (the English Act) and he pointed out that antedating and postdating of a cheque was permissible. He therefore concluded that even a dishonest antedating was not an offence. He then went on to say that assuming that there had been an offence, the offence was one not between the transferor and transferee, but between them on the one hand and the maker on the other; so that section 58 of the Negotiable Instruments Act did not apply. There can however be no doubt that section 13, cl. (2) of the English Act was not intended to render forgeries valid, but only to give legislative approval to well established commercial usage. Chalmers in his "Bills of Exchange", quotes English cases in which it was held that postdating in order to commit a fraud and which amounted to forgery, would not be protected by section 13, clause (2) of the Bills of Exchange Act. It is true, as Ramesam, J., points out, that section 58 of the Negotiable Instruments Act does not apply; but all the High Courts in India have applied the principle that a forged document is a nullity to negotiable instruments, despite the fact that this principle finds no mention in the Negotiable Instruments Act.

The appellant is also entitled to succeed on another ground, viz., that the transferor and the transferee did not intend title to pass by the endorsement. The plaintiff's case was that the promissory note was hers from the outset, that she had paid the consideration for the promissory note to the defendant, and that the endorsement was merely a piece of writing which would make it appear on the face of the note what was true even before the endorsement was made, viz., that the ownership of the note was in her. It was never her case that the promissory note belonged to P.W.5 in the first instance and that he had endorsed it for consideration to her. The learned Subordinate Judge says that although she did not pay any consideration for this endorsement, she might be regarded as endorsee for collection. It seems ridiculous to regard a woman ignorant of the ways of the world and of commerce as an endorsee for collection for a money-lender accustomed to this kind of transaction and to Court procedure. Her name appeared on this document for the sole purpose

1. (1928) I.L.R. 52 Bom. 810.
2. (1899) I.L.R. 24 Bom. 65.
3. (1906) I.L.R. 28 All. 428.

4. (1908) I.L.R. 36 Cal. 239.
5. A.I.R. 1926 Mad. 1154.

of enabling P.W.5 to obtain a decree against the appellant for a sum larger than the law permitted. The plaintiff therefore had no title to the promissory note; and her suit could have been dismissed on this ground alone.

The appeal is allowed, the decree of the lower appellate Court set aside, and the decree of the District Munsif restored. The appellant will receive his costs in this Court and in the lower appellate Court.

The respondent has filed a memorandum of cross-objections with regard to the costs disallowed by the lower appellate Court. It has not been pressed in view of the above decision, and so is dismissed without costs.

B. V. V.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Sivakoti Audayya

Appellant

v.

Sivakoti Sarabayya (deceased) and others

Respondents.

Inams—Service inam—Surrender by some of the holders in favour of the rest—Validity—Test.

The test to be applied to decide whether a surrender or relinquishment by some of the holders of a service inam of their interests in favour of the remaining inamdars is bad is to see whether it prevents the remaining service holders from enjoying the emoluments or interferes in any way with the performance of the office; and when the surrender does neither, it is not bad.

Appeal against the decree of the District Court of Vizagapatam in Appeal Suit No. 162 of 1941, preferred against the decree of the Court of the District Munsif of Yellamanchelli in Original Suit No. 132 of 1938.

Kasturi Seshagiri Rao for Appellant.

D. V. Reddi Pantulu for Respondents.

The Court delivered the following

JUDGMENT.—The only question which arises in this Second Appeal is whether a surrender or relinquishment by some of the holders of a service inam in favour of the remaining inamdars is bad.

The inamdars were seven in number and two of them brought a suit to recover their two-sevenths share in the inam from the defendant, in whose favour the former holder of the inam had made an alienation. The suit was decreed but in the meanwhile the remaining five inamdars surrendered their interests in favour of the others. The successful plaintiffs endeavoured to have the decree modified but without success, and they eventually brought a second suit in respect of the five-sevenths share covered by the relinquishment. It is attacked by the defendant as bad.

In the majority of cases cited on the validity of alienations of service inam lands, the alienations take the form of gift, sale or mortgage; and in the present case it is contended that a relinquishment by one service-holder in favour of another service-holder who is also his heir is as much an alienation as a sale or mortgage. The true test to be applied is, I think, to be found in the observations by Kumaraswami Sastriar, J., in *Sundararaju Dikshitulu v. Seshadri Dikshitulu*¹. In that case the validity of a lease was in question and in examining the matter the learned Judge made the following observations:

¹S.A. No. 2 of 1943.

31st January, 1944.

"In dealing with this question we have to see the nature of the transaction rather than the form. A lease for 90 years or for a long term in consideration of a premium paid down is as much an alienation as a sale or mortgage and I do not think that the mere use of the word "lease" or the fact that a long term is fixed would, having regard to the mischief which is sought to be guarded against by holding that service inam lands are not alienable, make the lease valid. The real question is whether the transaction in effect places the income from the lands beyond the disposal of the holder of the office and prevents him from enjoying the emoluments which were intended to go to the holder of the office in order to enable him to discharge his duties properly.

If the test be applied in the present case, there is no difficulty in finding that the relinquishment in favour of the plaintiffs does not prevent the remaining service-holders from enjoying the emoluments nor does it interfere in any way with the performance of the office. The situation is on all fours with a family partition in which service inam lands are, by agreement between the members, held by one of the members on his undertaking to perform the service instead of their being divided up into a number of unworkable small fractions amongst the various members. In the present case the total valuation of the land for the purposes of the suit is Rs. 128 and odd; so it must be obvious that it would be difficult if not impossible to have seven inamdars sharing this land between them and performing the duties of the office. The relinquishment does not offend against the rules laid down by Kumaraswami Sastriar, J., in the case cited, and I find that the decision of the learned District Judge is correct. In the result this Second Appeal is ordered to be dismissed with costs.

Leave is refused.

V.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

M. R. M. Murugappa Chettiar and others

.. *Appellants**

v.

S. M. Chengalvaraya Chettiar and others

.. *Respondents.*

Executing Court—Powers—Decree directing one item of property to be sold last—Executing Court ordering its sale first on the consent of parties—Sale ultra vires and has to be ignored.

The decree is a suit by a Municipality to recover the tax due in respect of four houses directed one of the houses over which a mortgage had been created *pendente lite* to be sold last. Subsequent to the decree the other three houses were purchased by a stranger in execution of a Small Cause decree against the judgment-debtor. When the Municipality attempted to execute its decree, the property which was directed by the decree to be sold last was by the fraudulent and collusive consent of the judgment-debtor in that suit and the purchaser of his three other houses ordered to be sold first and was so sold. In a suit to recover the money due in respect of the liability under the security bond in respect of that property executed during the pendency of the suit by the Municipality,

Held, that the Court sale itself was *ultra vires* as the execution Court had no jurisdiction to go behind the decree in spite of the consent of the parties and direct the sale of that item contrary to the terms of the decree and hence it was not binding on the plaintiff and has to be ignored.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. No. 45 of 1942 preferred against the decree of the Court of the District Munsif of Trichinopoly in O.S. No. 115 of 1940.

U. S. Ramaswami Aiyar for Appellants.

K. V. Srinivasa Ayyar for Respondents.

* S.A. No. 1163 of 1942.

The Court delivered the following

JUDGMENT.—The appellants before this Court are the legal representatives of the plaintiff in O.S. No. 115 of 1940 on the file of the District Munsif's Court of Trichinopoly, and the appeal arises out of a suit for recovery of money due in respect of the liability under the security bond executed by the first defendant in the suit to the second respondent herein. Defendants 2 to 5—respondents 3 to 6 herein are the sons of the first defendant. The sixth defendant—first respondent in this appeal was impleaded as the subsequent alienee of the hypotheca, being the purchaser of the house at Court auction held in O.S. No. 36 of 1928 on the file of the District Munsif's Court of Trichinopoly which was a suit filed by the Trichinopoly Municipality for recovery of arrears of municipal taxes due on the property. The plaintiff's contention was that the purchase in Court auction was as a result of fraud committed by the sixth defendant in collusion with the other defendants. The main contest in appeal is as between the plaintiffs and the sixth defendant. In the sale held in O.S. No. 36 of 1928 the sixth defendant—the first respondent in this appeal purchased door No. 24. That suit was filed on 18th January, 1928, for recovery of Rs. 50-8-0 due as tax in respect of houses Nos. 24, 25, 26 and 26-A which belonged to Subramaniam Chetti and Rajagopala Chetti. House No. 24 belonged in common to the two brothers. On the 13th February, 1928, there was a partition between them. On the 24th February, 1928, Rajagopala Chetti and his son the first defendant executed a security bond in favour of the plaintiff giving their half interest in house No. 24 as security. Rs. 625 was advanced. On the 20th March, 1928, a preliminary decree was passed in favour of the municipality and the decree directed house No. 24 to be sold last. On the 16th April, 1930, the sixth defendant in this suit purchased houses Nos. 25, 26 and 26-A in the sale held in execution of a small cause decree against Subramaniam Chetti. The final decree in O.S. No. 36 of 1928 was passed on the 12th August, 1931. On 18th January, 1937, the municipality filed E.P. No. 251 of 1937 for executing the decree in O.S. No. 36 of 1928 and when that execution petition was pending the sixth defendant filed a petition praying that house No. 24 may be sold first and that the other houses purchased by him, namely, 25, 26 and 26-A should not be sold. Notices were issued to Subramaniam Chetti and Manickam Chetti the first defendant herein. Subramaniam Chetti was absent, but Manickam opposed the prayer. On the 27th September, 1937, the first defendant and the sixth defendant entered into an agreement that door No. 24 should be sold first, and the Court, in pursuance of the agreement, directed that door No. 24 should be sold first, and that in spite of the specific direction in the decree itself that that item should be sold last. The sixth defendant became the purchaser of door No. 24 for Rs. 251 out of which only Rs. 122-2-0 was due to the decree-holder. The sixth defendant contended that inasmuch as the mortgage deed on which the suit was filed was executed during the pendency of O.S. No. 36 of 1928 and as he was a purchaser in a sale held in execution of the decree in that suit, the mortgage would not be binding on him, and it would be affected by the doctrine of *lis pendens* under section 52 of the Transfer of Property Act. The plaintiff's answer to that was that the execution proceeding in which the property was brought to sale and purchased by the sixth defendant was a collusive proceeding and hence the security bond is enforceable as against the hypotheca.

The first Court found in favour of the plaintiff, overruled the sixth defendant's objections and granted a preliminary decree. The learned Subordinate Judge of Trichinopoly on appeal held that there was no fraud or collusion affecting the rights of the sixth defendant and that consequently plaintiff cannot have preference as against the sixth defendant, and he set aside the decree so far as the sixth defendant was concerned. Hence this second appeal.

It was urged for the first respondent that the finding of the learned Subordinate Judge that there was no collusion or fraud was a finding on a ques-

tion of fact, that it is not open to this Court to go behind it; and that consequently the second appeal should be dismissed. For the appellants it is stated that two substantial questions of law are involved in this case, *viz.*, that the Court sale itself was *ultra vires* as the execution Court had no jurisdiction to go behind the decree and direct the sale of door No. 24 contrary to the terms of the decree. It is further contended that this is a case in which fraud and collusion were sought to be inferred from certain facts and that it is only in respect of the truth of those facts the finding will be final, that the inference to be drawn from such facts would be a question of law and therefore it would be open to the appellants to show that on the facts found the inference that there was no fraud and collusion was incorrect and that it will be open to the appellants to raise that plea.

The first point for consideration is whether the sale was *ultra vires* of the powers of the execution Court and hence invalid. The decree specifically states that door No. 24 should be sold last. The properties by the sale of which the Municipality sought to recover the tax consisted of four houses which belonged to two different individuals, namely, Subramaniam Chetti and Rajagopala Chetti who had become divided before the date of the decree. The rights as between the two owners were sought to be adjusted by directing the sale of the properties of Subramaniam Chetti in the first instance, and by directing door No. 24 to be sold last. Subsequent to the date of the decree the sixth defendant herein purchased houses Nos. 25, 26 and 26-A in execution of the decree obtained against Subramaniam Chetti in S.C. S. No. 4843 of 1927 on the file of the Court of Small Causes at Trichinopoly. He had already a hypothecation right over that item under a document of 1921. He thus became the absolute owner of doors Nos. 25, 26 and 26-A. So, when in execution of the decree in O.S. No. 36 of 1928 the properties purchased by him were brought for sale (*vide* Ex. C) he filed a petition Ex.D for an order for declaring that houses 25, 26 and 26-A were not liable to be sold in execution of the decree and that in any event door No. 24 should be sold in the first instance. From the order on the petition dated 24th August, 1937, it is seen that the sixth defendant herein had already deposited the amount into Court and his counsel stated that that amount may be appropriated towards the amount of the decree in the event of the petition being decided against him and that on the strength of that understanding the sale was stayed and notice was given to judgment-debtors. Subramaniam Chetti was absent, but the second respondent Manickam Chetti—the first defendant in this suit contested the matter. He opposed the application. On the 27th September, 1937, the Court passed the following order:—

"Though as per the decree D. No. 24, T.S. No. 105, has to be sold last the defendants and present petitioner, as a result of some understanding between them, file a memo, now stating that door No. 24, may be sold first instead of as the last item. The decree-holder, however, has no objection to this course. Door No. 24 T.S. No. 105 will be sold as the first item in the sale."

In that sale the sixth defendant purchased the property.

It is urged for the appellants that the order directing the sale of door No. 24 last and to direct the sale of the other items which belonged to only one of the two joint mortgagors first was an order by way of marshalling, that the Court executing the decree had no right to go behind the decree and that such an order will be *ultra vires*. In *Subba Iyer v. Pichamani Iyer*¹, it was pointed out by this Court that where marshalling had been ordered in a decree that order cannot be interfered with or altered by the Court executing the decree. In this case, in spite of the consent of the parties the Court had no jurisdiction to interfere with the terms of the decree directing the order in which the properties were to be sold. In *Kotagiri Venkatasubbamma Rao v. Vellanki Venkatarama Rao*², it was

1. (1926) 24 L.W. 260.

197 : I.L.R. 24 Mad. 1 (P.C.).

2. (1900) 10 M.L.J. 221 : L.R. 27 I.A.

pointed out by the Privy Council that an order directing an amendment of a decree even with the consent of the parties could not be made except under the provisions of either section 206 or 623 of the Civil Procedure Code (Order 20, rule 6 or section 114 of the new Code). It was pointed out by this Court in *Venkatagiri Iyer v. Sadagopachariar*,¹ that such variations of decrees must be treated as made *ultra vires* in determining the question whether the execution of the decree was or was not barred by the law of limitation. In *Lodd Govindas v. Ramadas*,² it was pointed by this Court that a transaction by which the parties agree to vary the mode in which the reliefs granted by the decree are to be realised in execution in the suit is a transaction which attempts to vary the terms of the decree and to allow such a variation was clearly against the policy of the Civil Procedure Code, and reference is made to the decision of the Privy Council in *Kotagiri Venkatasubbamma Rao v. Vellanki Venkatarama Rao*.³ In the light of these rulings it has to be held that the order passed in E.A. No. 1411 of 1937 on the petition of the sixth defendant herein directing door No. 24 to be sold as the first item in the sale was *ultra vires*.

It is urged for the respondents that the sale cannot be said to be *ultra vires* though it could be said that the order was incorrect; that a Court has got a right to pass a wrong as well as a right order, and the fact that the Court order is incorrect would not make it *ultra vires*. But then in this case the execution Court had no jurisdiction to vary the terms of the decree and pass an order on the basis of which variation the order so passed must be considered to be one without jurisdiction and can have no legal effect. I therefore find that the sale of door No. 24 was *ultra vires* and is not binding on the plaintiff and has to be ignored.

The next contention raised is that the lower Court was not justified in finding that there was no fraud or collusion. There is no dispute about the facts from which the fraud and collusion is sought to be inferred. Those facts are the facts stated in the order in E.A. No. 1411 of 1937 (Ex.1-C), which I have already extracted above. The sixth defendant, having become the purchaser of those properties which were directed to be sold first in a sale held in execution of a small cause decree obtained against Subramanian Chetti, was interested in saving that property. That is why he filed E.A. No. 1411 of 1937 for an order directing that those properties should not be sold. Subramanian Chetti having lost all rights to the property was *ex parte*. But Manickam Chetti the first defendant herein who was the mortgagor in respect of door No. 24 opposed the application and contended that door No. 24 should be sold last. The plaintiff in this suit was not a party to those proceedings, and the person through whom he claimed opposed the application. In the face of the directions in the decree the executing Court would not have directed the sale of door No. 24 first but for the consent given by Manickam Chetti. The decree-holder was indifferent because he will be able to get his money whether door No. 24 is sold first or the other items are sold. The amount due to the decree-holder was only Rs. 122-2-0 and door No. 24 itself had been sold for Rs. 251. So the Municipality was indifferent. The second defendant in that suit, namely, Manickam Chetti the first defendant herein first opposed the application. But as a result of an understanding between him and the petitioner the sixth defendant herein they filed a memo. stating that door No. 24 may be sold first instead of as the last item. It is thus clear that there was collusion between the sixth defendant and the first defendant in this suit as a result of which such an order was passed prejudicial to the plaintiff herein who had obtained a mortgage right over the properties and behind his back. So from

1. (1900) 14 M.L.J. 359 at 367.
2. (1915) M.W.N. 225.

3. (1900) 10 M.L.J. 221; L.R. 27 I.A. 197; I.L.R. 24 Mad. 1 (P.C.).

the very statement of facts in the order Ex.1-C the only inference that could be drawn is that there was collusion between the first defendant and the sixth defendant, the order was as a result of collusion and that consequently the sale in favour of the sixth defendant was the result of collusion and fraud. The learned Subordinate Judge does not seem to have been aware of the fact that the decree itself directed door No. 24 to be sold last. If he had been aware of it he would certainly have mentioned it and dealt with the question as to whether it could be said that there could be no fraud when the arrangement was directly in contravention of the terms of the decree. The question as to whether inference drawn from certain admitted facts is a question of law or a question of fact had to be considered by the Calcutta High Court in *Radha Madhab v. Kalputaru*¹ and Mukerji, J., at page 213 makes the following observation:

"It has been urged before us, that, that finding is binding upon this Court in second appeal. But, as was observed by Baron Parke in *Murray v. Mann*², although it is the duty of the judge to determine the facts upon which the allegation of fraud is based whether the facts so found justify the inference of fraud is a question of law for the Court to determine. We have thus to consider whether the facts found by the Courts below justify the inference which has been drawn from them."

And in that case the Court found that the facts, even if they were assumed to be established, did not justify the inference that there was fraud vitiating the decree. In *Beniram v. Kundanlal*,³ in dealing with the question of acquiescence, their Lordships of the Privy Council held that acquiescence was not a question of fact, but one of legal inference from the facts found, and that upon it the judgments of the appellate Courts were not final. In *Periamurugappa Asari v. Manicka Chetti*⁴ it is pointed out by Venkatasubba Rao, J., that in that case it was proved that the plaintiffs and the first defendant entered into an agreement for the purpose of defeating the rights of the auction purchasers and that in pursuance of the agreement a decree was allowed to be passed in favour of the plaintiffs and that those facts would be sufficient to establish collusion which rendered the rule of *lis pendens* inapplicable. In this case, but for the agreement between Manickam Chetti and the sixth defendant herein the executing Court would not have passed an order directly at variance to the term of the decree sought to be executed. The plaintiff was indifferent, and the two contesting defendants whose interests were adverse subsequently entered into an arrangement and consented to the prayer of the sixth defendant being granted. They must have known by then about the mortgage in favour of the plaintiff herein, for the encumbrance certificate filed in the proceedings must have shown this mortgage, and when they entered into an arrangement like the one in question they must have known that it would be prejudicial to the plaintiff herein—mortgagee.

On the facts admitted it will have to be found that there was collusion. The decision in *Kishorilal v. Piarelal*,⁵ has no application to the facts of this case. All that was held was that the question as to whether a certain proceeding was collusive or not was a question of fact which the High Court is not entitled to go behind. But then it does not appear that in any of the cases referred to therein the question was whether the fraud was sought to be inferred from some proved or admitted facts as in this case.

I therefore find that the learned Subordinate Judge was not right in finding that there was no collusion. Inasmuch as I have found that the order for sale itself is *ultra vires*, section 52, Transfer of Property Act, cannot apply.

1. (1912) 17 C.L.J. 209.

2. (1848) 2 Exch. 538.

3. (1899) L.R. 26 I.A. 58; I.L.R. 21

All. 496 (P.C.).

4. (1924) 49 M.L.J. 68.

5. I.L.R. (1940) Lah. 60.

In the result the second appeal is allowed, the decree of the lower appellate Court is set aside so far as the sixth defendant is concerned and the decree of the first Court restored with costs in all the three Courts.

Leave refused.

V. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

The Public Prosecutor.

Appellant*

v.

Atapaka Venkayya

Respondent.

Defence of India Act (1939), section 2 (2)—Defence of India Rules (1939), rule 81 (2)—Foodgrains Control Order (1942), clause (3)—Intra vires the Central Legislature—Storage of paddy in wholesale quantities without licence for sale at a future date—Offence punishable under clause (3).

A power to control includes a power to prohibit. Therefore section 2 of the Defence of India Act which empowers the Central Government to make rules for the control of trade or industry for the purpose of regulating or increasing supplies or for maintaining supplies and services essential to the life of the community confers power to prohibit a person carrying on a particular trade should this course be deemed necessary in the interests of the community. The Central Government have the power under rule 81 (2) of the Defence of India rules made under section 2 of the Act, to issue the Foodgrains Control Order and the provisions of clause (3) of that Order which requires a dealer in wholesale quantities of foodgrains to take out a licence are in all respects *intra vires* notwithstanding that there is a discretion in the matter of issuing licences.

Storage in wholesale quantities for the purpose of future sale is just as much an offence as sale if a licence has not been granted or obtained under clause (3) of the Foodgrains Control Order.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Sessions Judge of Nellore in C.A. No. 17 of 1943, on his file (C.C. No. 16 of 1943, on the file of the Court of the Joint Magistrate, Gudur).

The Advocate-General, Mr. N. Rajagopala Ayyangar and The Assistant Public Prosecutor for Appellant.

Mr. A. Akkaraju for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The respondent was charged in the Court of the Sub-Divisional Magistrate of Gudur with having been engaged in an undertaking which involved the purchase, sale and storage for sale in wholesale quantities of foodgrains without a licence issued under the Foodgrains Control Order, 1942, and that thereby he had committed an offence punishable under rule 81 (4) of the rules framed under the Defence of India Act, 1939, read with rule 81 (2) (a). The Sub-Divisional Magistrate held that the offence had been proved and sentenced the respondent to pay a fine of Rs. 500. In default of payment of the fine he was sentenced to undergo simple imprisonment for two months. The respondent appealed to the Sessions Judge of Nellore, who set aside the conviction and sentence. This appeal has been preferred by the Provincial Government from the order of the Sessions Judge acquitting the respondent.

The judgment of the Sessions Judge is of unnecessary length and certainly cannot be commended for clarity of expression. In fact, in places it is very difficult to follow what is meant. So far as we understand the judgment the Sessions Judge was of the opinion that clause (3) of the Foodgrains Control Order, which

requires a dealer in wholesale quantities of foodgrain to take out a licence, is *ultra vires* the Central Government because if given effect to, it may operate to prohibit a dealer carrying on his business. The Sessions Judge also indicated that if he had not formed the conclusion that clause (3) of the Foodgrains Control Order was *ultra vires* he would have felt constrained to direct a re-trial. For reasons which we shall state we consider that the Sessions Judge erred in holding clause (3) of the Foodgrains Control Order to be *ultra vires* and that a re-trial would be necessary if it were *intra vires*.

Sub-section (1) of section 2 of the Defence of India Act, 1939, states that the Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the War, or for maintaining supplies and services essential to the life of the community. Sub-section (2) states that without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower an authority to make orders providing for all or any of the matters set out in the sub-section. Clause (20) of the sub-section reads as follows:

"The control of agriculture, trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to, articles or things of any description whatsoever which can be used in connection with the conduct of the war or for maintaining supplies and services essential to the life of the community."

Sub-section (4) of section 2 provides that the Central Government may by order direct that a power or duty which by rule under sub-section (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged—(a) by an officer or authority subordinate to the Central Government or (b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws, by a Provincial Government or by an officer or authority subordinate to such Government, or (c) by any other authority. Sub-section (5) gives to the Provincial Government a power of delegation of a power or duty which by rule made under sub-section (1) is conferred upon it.

In *Kewalram v. The Collector of Madras*¹, this Court held that when a power has been delegated under section 2 (4), a person or authority to whom the delegation has been made has all the power of the Central Government, unless the order of delegation contains some restriction on the exercise of the power.

Sub-rule (2) (a) of rule 81 of the rules made under section 2 of the Act states that the Central Government or the Provincial Government, so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the War or for maintaining supplies and services essential to the life of the community, may by order provide:

"for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever and in particular for prohibiting the withholding from sale, either generally or to specified persons or classes of persons, of articles or things kept for sale, and for requiring articles or things kept for sale to be sold either generally or to specified persons or classes of persons or in specified circumstances."

Clause (f) as it stood when the offence was committed in this case stated that the Central Government or the Provincial Government might by order provide:

"for any incidental and supplementary matters for which the Central Government or the Provincial Government thinks it expedient for the purposes of the order to provide, including, in particular, the entering and inspection of premises to which the order relates with a view to securing compliance with the order; and an order under this rule may prohibit the doing of anything regulated by the order except under, and in accordance with the conditions of, a licence granted by such authority as may be specified in the order, and may

be made so as to apply either to persons or undertakings generally or to any particular person or undertaking or class of persons or undertakings, and either to the whole or any part of any undertaking, and so as to have effect either generally or in any particular area."

The Foodgrains Control Order was notified on the 21st May, 1942. It was made by the Central Government in exercise of the powers conferred by sub-section (2) of rule 81 of the Defence of India Rules. Clause (3) states that no person shall engage in an undertaking which involves the purchase, sale or storage for sale, in wholesale quantities of any foodgrain, except under and in accordance with a licence issued in that behalf by the Provincial Government or by an officer authorised by the Provincial Government in this behalf. Rule 2 (c) defines "purchase in wholesale quantities" as meaning the purchase in quantities exceeding twenty maunds in any one transaction, and includes purchase by any person on behalf of another as a commission agent or as an *arhatiya*. Clause (d) contains a corresponding definition of "sale in wholesale quantities". A definition of "storage for sale in wholesale quantities" has been inserted in clause (2), but this was done at a later date and clause (3) must be construed without the aid of this definition. This is not difficult.

Clause (a) of rule 81 (2) is a lawful provision. As we have seen, sub-section (1) of section 2 of the Act, empowers the Central Government to make such rules as appeared to it necessary or expedient for, *inter alia*, maintaining supplies and services essential to the life of the community, and sub-section (2) expressly empowers it to make rules for the control of trade or industry for the purpose of regulating or increasing supplies or for maintaining supplies and services essential to the life of the community. A power to control includes a power to prohibit, as the Court of Appeal in England pointed out in *The Queen v. Croydon and Norwood Tramways Company*¹. In that case Lindley, L.J., observed,

"If I prohibit a man from doing a thing, I control him to that extent."

Therefore section 2 confers power to prohibit a person carrying on a particular trade should this course be deemed necessary in the interests of the community in these days of national peril. Although the Sessions Judge appeared to think there was, there is no analogy between the Defence of India Act, and the rules framed thereunder and provisions in an Act conferring upon a municipal authority licensing powers. One way of controlling or regulating a trade is by insisting upon those engaged in it taking out licences. The power to grant a licence must contain a power to refuse one if this is deemed to be expedient. In our judgment the Central Government had the power under rule 81 (2) to issue the Foodgrains Control Order and the provisions of clause (3) are in all respects *intra vires* notwithstanding that there is a discretion in the matter of issuing licences.

Before turning to the merits of the case for the prosecution it is necessary to deal with an argument which has been stressed in this Court by the learned advocate for the respondent. The licences contemplated by clause (3) of the Foodgrains Control Order are issued by the Grain Control Officers. It is said that the Provincial Government has no power of delegation. This contention is obviously fallacious in view of the provisions of section 2 (5) of the Defence of India Act. All that is necessary to be assured of is that there has been a delegation. This question was not dealt with by the learned Sessions Judge. The learned Advocate-General has had no difficulty in satisfying the Court on this point. On the 17th June, 1942, the Governor of Madras in exercise of the powers conferred by sub-section (5) of section 2 of the Defence of India Act, directed that the powers conferred upon the Provincial Government by clause (3) of the Foodgrains Control Order shall be exercised also by the Grain Control Officers within their respective jurisdiction, subject to the control of the Special Officer for Prices,

1. (1886) 18 Q.B.D. 39.

Madras. This notification was published in the *Fort St. George Gazette* of the 23rd June, 1942.

The charge against the respondent related to the period from the 1st July, 1942, to the 5th September, 1942, during which time the respondent held no licence. On the 5th September, 1942, the Deputy Tahsildar inspected the premises of the respondent and found stored therein 150 bags of paddy. He examined the books of the respondent which showed that he had been carrying on a wholesale trade in paddy and rice from the 1st July, 1942. He questioned the accused, who told him that he had applied for a licence and that he was carrying on the trade in anticipation of its being granted to him. The Deputy Tahsildar again visited the respondent's godown on the 20th November, 1942, and discovered that between the 5th September and 4th October, 1942, the respondent had disposed of the 150 bags of paddy. In the course of his examination by the Magistrate before the framing of the charge under section 342, Criminal Procedure Code, the respondent repeated his statement that he had been carrying on business in anticipation of a licence being granted to him.

In Criminal Appeal No. 934 of 1943, Horwill, J., held that storage for sale within the meaning of the Foodgrains Control Order is not an undertaking within clause (3) and consequently if storage for sale in wholesale quantities is to be an offence it must be proved that it was stored for the purpose of fulfilling a contract. This opinion was dissented from by Kuppuswami Ayyar, J., in Criminal Revision Case No. 986 of 1943. Kuppuswami Ayyar, J., considered that if a person undertakes to trade and if he stores foodgrains in wholesale quantities for sale in future under contracts to be entered into in the future, he is guilty of an offence punishable under clause (3). We have no hesitation in agreeing with Kuppuswami Ayyar, J.

Storage in wholesale quantities for the purpose of sale is just as much an offence as sale if a licence has not been granted. There is no doubt that the respondent did store foodgrains during the period between the 1st July and 5th September, 1942, in contravention of clause (3) of the Foodgrains Control Order. He was a dealer in foodgrains and on the 5th September, he had on his premises 150 bags of paddy, which was far in excess of twenty maunds. It was obviously there for the purpose of sale because the paddy was sold. It had been sold when the Deputy Tahsildar visited the godown on the 20th November, 1942.

In these circumstances the learned advocate for the respondent very properly said that he did not wish the case to be sent back for re-trial as suggested by the Sessions Judge. He contended, however, that there was a flaw in the procedure adopted by the trial Magistrate and that this justifies the rejection of the appeal against the acquittal. The complaint is that the questions which were put to him when he was examined under section 342, Criminal Procedure Code, were not sufficiently specific. We consider that there is no substance in this contention. By no stretch of imagination can it be said that there has been any miscarriage of justice. Nothing which was said or might have been said in the course of the trial could alter the fact that on the 5th September, 1942, the respondent had stored on his premises 150 bags of paddy and that they were stored for the purpose of sale.

As an offence has been established, the appeal must be allowed, which means that we convict the respondent and impose the same sentence as the Magistrate imposed.

The learned advocate for the respondent has asked us to issue a certificate under sec. 205 of the Government of India Act, 1935. We are unable to do so because the case involves no question of the interpretation of that Act or any Order-in-Council made thereunder.

V.S.

Appeal allowed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT:—LORD MACMILLAN, LORD WRIGHT, AND LORD JUSTICE DU PARCQ.

Shree Meenakshi Mills, Limited

.. Appellant.

v.

Patel Brothers

.. Respondents.

Arbitration Act (X of 1940).—Appellate award declared to be a nullity—Original award cannot be deemed to be merged in appellate award and set aside—Remand to arbitrators—Procedure—Arbitration Act, (1940), section 16—Scope—Reference not to individuals but to a board—How far members of the board must act together.

When the rules governing an arbitration provide for an appeal from an award, the result of declaring the proceedings taken by way of appeal from the award to be a nullity is to leave the parties in the position which they occupied immediately before those abortive proceedings were begun. The notice of appeal is still effective and the original award stands until such time as it may be replaced by an effective decision of the appellate body. The original award may be said to have merged in the appellate award only when the appellate body has come to a valid and effective decision. But when the proceedings before the appellate body are declared to be a nullity there can be no question of any such merger and the original award cannot be set aside.

When what purports to be the decision of arbitrators is a nullity there is no power to remit the award and section 16 of the Arbitration Act, 1940, has no relevance to the circumstances of the case. Nor is there need for any such power, since there is nothing to remit and on the annulment of the award the parties are entitled to a new and effective hearing and determination.

An order "remitting back" the notice of appeal to the body of appellate arbitrators "to be dealt with according to law" amounts to no more than a direction to the appellate body that the parties are entitled to have the appeal heard. The law gives the parties a right to an adjudication by the appellate arbitrators but if neither of them wishes to exercise the right the law will not compel them to exercise it.

Quære: Where a reference to arbitration is not to individuals but to a body such as a committee or a board whose corporate powers are regulated by its constitution how far all the members of the body must act together.

Their Lordships' Judgment was delivered by

LORD JUSTICE DU PARCQ.—In September, 1940, a dispute arose between the parties to this appeal as a result of transactions in which they had been engaged in the cotton markets of Bombay, Liverpool and New York. An agreement between the parties provided for arbitration under the by-laws of the East India Cotton Association, Ltd. Two arbitrators were appointed in accordance with those by-laws, and there is now no dispute about the validity of their appointment. On the 19th March, 1941, the arbitrators made an award whereby they awarded to the respondents the sum of Rs. 34,508-6-5 with interest.

The appellants were dissatisfied with this award. The by-laws of the East India Cotton Association gave them a right of appeal to the Board of the Association "within 10 days from the date of publication of the award," and they gave a proper notice of appeal within the prescribed period. The by-laws define "the Board" as meaning "the Board of Directors" of the Association "acting through at least a quorum of their number at a meeting of that Board duly called and constituted". The articles of association provide, that six shall form a quorum.

Nine members of the Board were convened to hear the appeal. During the argument of counsel for the appellants one of the nine went away and did not return. His departure and his absence appear to have escaped the notice of counsel. The appeal was fully heard by the remaining eight members, who by a majority, decided that the sum awarded to the respondents should be reduced to Rs. 12,508-6-5. This decision was published on the 21st June, 1941. It was signed by the Chairman and Secretary, who had been authorised to sign it on

the Board's behalf. On the 11th July, 1941, the award of the 19th March, 1941, and the decision on appeal were filed in the office of the Prothonotary of the High Court, who gave notice of such filing to the appellants on the 18th July, 1941.

The appellants thereupon petitioned the High Court of Bombay, praying "that the alleged awards dated 19th March, 1941, and 21st June, 1941, be declared to be invalid and set aside and taken off the file of the records of this Honourable Court". The petition was heard by Chagla, J. The learned Judge was of opinion that when once the Board had been constituted for the purpose of hearing the appeal, the nine members who had been convened were to be regarded as joint arbitrators. Taking that view, he held that the appellants were entitled to an adjudication by all nine arbitrators acting together, and that the decision of the 21st June, 1941, which purported to be the decision of the Board, was invalid. The learned Judge expressed the opinion that all the members of the Board who adjudicated should have signed the award, but if it had been necessary to decide the point he would have considered that this was an irregularity which could be cured, and would have remitted the award to them for their signatures. The conclusion at which the Judge arrived was that "the award must be set aside". As he had made no finding adverse to the validity of the award of the arbitrators, dated the 19th March, 1941, this mode of expression might have left it uncertain whether he intended to do more than set aside the decision on appeal, but the formal order of the Court put the matter beyond doubt, stating as it did in terms that both the decision of the Board and the award of the arbitrators were to be set aside and taken off the file of the Court.

The respondents then in their turn appealed to the High Court in its appellate jurisdiction, contending that the decision of the Board was valid and regular, and that the order of Chagla, J., was wrong. The appeal was heard by Sir John Beaumont, C.J., and Somjee, J. The Court affirmed the decision of Chagla, J., on the main issue. They held that in the circumstances the decision of the Board was a nullity, and must be set aside. They further held, however, that there was no ground for setting aside the award of the arbitrators. The learned Chief Justice, in whose judgment Somjee, J., concurred, expressed the opinion that "the so-called appeal" was

"not really an appeal but . . . a continuation of the arbitration so that one award had been made on two different dates, and in two different parts, by two different sets of arbitrators".

The position thus was that part of the award had been validly made, but the other part had so far not been made. "If that is so" said the learned Chief Justice, "I think we can remit that portion of the award" (*viz.*, the decision of the Board) "under section 16 of the Arbitration Act and in my view that is really the only course which is open to this Court". The Court accordingly made a declaration that the appeal against the original award had never been heard by a properly constituted Board, and ordered that the order of the Board should be set aside, and that the notice of appeal should be "remitted back" to the Board "to be dealt with in accordance with law". Against this order the present appeal is brought. The appellants naturally do not question the correctness of so much of the decision of the High Court as declared that the proceedings before the Board of Directors were a nullity, and since there was no cross-appeal, their Lordships are not called upon to express any opinion upon that part of the decision, and must not be understood to express either approval or disapproval of it. Should the same question arise for decision hereafter, it will be necessary to consider whether the well-established principle that, in the case of a reference to two or more named arbitrators, all the arbitrators must act together, can properly be applied when the reference is not to individuals but to a body, such as a Committee or a

Board, whose corporate powers are regulated by its constitution. It is perhaps desirable to add that their Lordships must not be taken to assent to the opinion expressed *obiter* by Chagla, J., that an award made by the Board ought to be signed by all the members of the Board who have adjudicated. Their Lordships do not desire to express any opinion on that point.

For the purposes of this appeal their Lordships must assume without deciding, that the proceedings before the Board of Directors were a nullity. On that view there can be no doubt, and it was not disputed, that the declaration to that effect was properly made. The objection taken by the appellants to the order of the High Court was two-fold.

In the first place, it was said that the power of the Court to remit an award depended on statute, and that section 16 of the Arbitration Act, 1940, under which the Court purported to act, gave no power to remit the award, or the notice of appeal, in the circumstances of this case. Secondly, the appellants submitted that the original award of the arbitrators and the decision of the Board on appeal must be regarded as together constituting one indivisible award, and that it was impossible to set aside a part of that indivisible entity without setting aside the whole.

It is convenient to deal first with the second of these submissions. No authority could be cited to support it, and in their Lordships' view it is not sound in principle. When the rules governing an arbitration provide for an appeal from the first award, the result of declaring the proceedings by way of appeal to be a nullity must be to leave the parties in the position which they occupied immediately before those abortive proceedings were begun. The notice of appeal is still effective and the original award stands until such time as it may be replaced by an effective decision of the appellate body. It was suggested on behalf of the appellants that the original award was "merged" in the decision of the Board on appeal. This figure of speech may be justified when the Board has come to a valid and effective decision. Such a decision is substituted for the original award. The original award then ceases to have any further force or effect, and may be said without impropriety to be "merged" in the final decision. But when once it is established that the proceedings before the Board are to be regarded as a nullity, there can be no question of any such merger. Their Lordships are therefore clearly of opinion that the appellants were at no time entitled to have the original award set aside.

With regard to the appellants' first submission their Lordships are of opinion that although the order under appeal was in substance correct, it could not properly be founded on section 16 of the Arbitration Act, 1940. It appears to their Lordships, with great respect to the learned Chief Justice, that this section has no relevance to the peculiar circumstances of the present case. The section specifies three sorts of defects which may necessitate reconsideration of an award, and empowers the Court to remit the defective award in the cases specified (and in no others) to the arbitrator or umpire, and to fix the time within which the arbitrator or umpire is to submit his decision to the Court. When what purports to be the decision of arbitrators is a nullity, there is no power to remit it. Nor is there need for any such power, since there is nothing to remit, and since it necessarily follows from the fact that the decision is annulled that the parties are entitled to a new and effective hearing and determination.

It is apparent therefore that no injustice has been done to the appellants and that the order appealed from is in substance perfectly correct. The order which was drawn up made no express reference to section 16 of the Arbitration Act and can hardly be said to be erroneous even in form. It speaks of "remitting back" the notice of appeal to the Board of Directors "to be dealt with according to law". This amounts to no more than a direction to the Board that the parties are entitled to have the appeal heard. It was suggested by counsel for

the appellants that the order was mandatory in form and might be read as compelling the parties to proceed with the appeal even though neither of them were willing to do so. In their Lordships' opinion the inclusion in the order of the words "to be dealt with in accordance with law" precludes such a construction of the order. The law gives the parties a right to an adjudication by the Board of Directors. If neither of them wishes to exercise the right the law will not compel them to exercise it.

It follows that no complaint of substance can be made against the order appealed from. Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants should be ordered to pay to the respondents their costs of the appeal.

K. S. . . .

Appeal dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT:—VISCOUNT MAUGHAM, LORD MACMILLAN AND LORD WRIGHT.

Sopher and another

*Appellants**

v.

The Administrator-General of Bengal and another

Respondents.

Succession Act (XXXIX of 1925), section 113—Scope—Bequest to unborn person subject to prior bequest for life—Bequest subject to beneficiary surviving his parent and attaining age of eighteen—Bequest void as not comprising whole of the remaining interest of the testator—Bequest of income also to such legatee till he attains age of eighteen—Effect—Section 120 exception—Not applicable—Interpretation of statutes—Sections to be read and construed with the illustrations.

If under a bequest to a person not in existence at the time of the testator's death subject to a prior bequest contained in the will, there is a possibility of the interest given to the beneficiary being defeated either by a contingency or by a clause of defeasance the beneficiary under the later bequest does not receive the interest bequeathed in the same unrettered form as that in which the testator held it and the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed as contemplated by section 113 of the Succession Act, 1925. Such a bequest is accordingly void. *Pullibai v. Naoroji*, (1923) 28 C.W.N. 735 approved.

Where a legacy is given subject to a double contingency, *e.g.*, that the legatee must survive a named person and must also attain a particular age the exception to section 120 of the Succession Act, 1925 does not apply. The exception applies only to the case where a fund is given to any person on his attaining a particular age. It has no relation to any other contingency, *e.g.*, to his surviving a named person. In such a case even if the income of the fund bequeathed is given to the legatee the legacy is not vested but only contingent and where the legatee is unborn on the date of the testator's death void according to the interpretation of section 113 of the Succession Act.

A section must be read and construed in connection with the illustrations found in the Act. *Ariffin v. Gark*, (1916) L.R. 43 I.A. 286, referred to.

Their Lordships' Judgment was delivered by

VISCOUNT MAUGHAM.—The questions raised in this appeal relate to the construction of the will of Edward Abraham Sopher, a resident of Calcutta, domiciled in British India, who had carried on the business of a stock and exchange broker in that country.

His will was dated the 16th April, 1926. He died on the 24th February, 1939, leaving him surviving a widow, the second respondent, and two sons, the appellants. The sons were of age at the date of his death but unmarried. On the 1st May, 1930, probate of the will was granted to the first respondent, the sole executor and trustee of the will.

By his will the testator, after certain bequests of the goodwill of his business and of other property not material to the present appeal, proceeded to dispose of his residuary estate by some very elaborate and somewhat confusing

clauses. After the usual trusts for conversion, the trustee was directed to stand possessed of the residuary estate upon trust out of the income to pay the testator's widow a monthly sum of Rs. 1,500 for her own use and benefit during the term of her natural life. As to the balance of the income the trustee was directed to hold and stand possessed of the same:

"Upon trust during the life-time of my said wife to pay the balance of the net income thereof (after payment of the said monthly allowance of Rupees One thousand and five hundred to my said wife) to my children; if more than one in shares such that each male child shall take double the share of each female child, and if there shall be only one such child the whole of such balance of income shall be paid to such one child. And if any child of me shall die in my life-time or in the life-time of my said wife leaving children or a child him or her surviving, the share of the said balance of income which would have been payable to the child so dying had he or she been living, shall during the life-time of my said wife be paid to his or her children, if more than one, in shares such that each male child shall take double the share of each female child and, if there shall be only one such child the whole of such share of the said balance of income shall be paid to such one child. And if any child of me shall die in the life-time of my said wife without leaving any children or child him or her surviving the share of the said balance of income which would have been payable to the child so dying had he or she been living shall during the life-time of my said wife be paid to such of my children as shall survive the child so dying and the child or children of such of my children as shall have predeceased the child so dying in shares such that males shall in all cases take double the shares of females and the child or children of any such predeceased child shall take only the share his, her or their deceased parent would have taken, if living and, if there shall be only one child or one grandchild of me who shall be entitled to the benefit of this provision then the whole of such balance of income shall during the life-time of my said wife be paid to such one child or grandchild as the case may be."

The testator has been dealing in this clause with an annuity to the widow and the surplus income which will remain after its payment until her death. The testator proceeded to deal with corpus as follows:—

"I further declare and it is my express desire that the corpus of my residuary estate shall not be divided until the death of my said wife and I will and direct that upon her death my Trustee shall hold and stand possessed of my residuary estate, corpus as well as income, upon trust to divide the corpus thereof into as many parts or shares as there shall be children of me living at my death or who shall die in my life-time leaving children or a child living at my death and designate the said several shares by the name of the said several children respectively, each share designated by the name of a male child to be double of each share designated by the name of a female child, and if there shall be only one such child then to designate the whole of the said corpus by the name of such one child and to hold and stand possessed of the several shares or the whole of the said corpus, as the case may be designated by the names or name of any children or child of me who shall be living at my death and shall also survive my said wife, upon trust to pay the net income thereof to the respective children or child by whose names or name the same shall be so designated for and during the term or their respective lives and after the death of each such child to hold and stand possessed of the share or the whole of the corpus as the case may be designated by the name of such child upon trust to pay the income thereof, to his or her children until they shall respectively attain the age of eighteen years and on their respectively attaining that age upon trust as to the corpus as well as the income thereof for such children absolutely in shares such that each male child shall take double the share of each female child, and if there shall be only one such child then in trust as to the whole for such one child absolutely and if any child of me shall die without leaving any children or child him or her surviving then I will and direct that the share designated by the name of the child so dying shall after the death of such child be held by my Trustee as to the corpus as well as the income thereof upon trust for such of my children as shall survive the child so dying and the child or children of such of my children as shall have predeceased the child so dying absolutely in shares such that males shall in all cases take double the shares of females, and the child or children of any such predeceased child shall take only the share which his her or their deceased parent would have taken if living and if there shall be only one child or grandchild of me who shall be entitled to the benefit of this provision then as to the whole, in trust for such one child or grandchild as the case may be absolutely."

The will then continues as follows:—

"And as to the shares or the whole of the said corpus as the case may be designated by the names or name of any children or child of me who shall die in my life-time leaving children or child living at my death or who shall survive me and shall die in the life-time of my said wife I will and direct that my Trustee shall hold and stand possessed of the

same upon the same or the like trusts as are hereinbefore declared concerning the shares or the whole of the said corpus as the case may be designated by the names or name of children or a child of me who shall be living at my death and shall also survive my said wife and expressed and intended to take effect after the death of such last mentioned children or child. I further will and direct if and so long as any child of me shall be under the age of eighteen years then and in every such case my Trustee shall out of the income payable to such child during the life-time of my said wife pay to my said wife the sum of Rupees Five Hundred per month for the maintenance and education of my said child and after the death of my said wife my Trustee shall out of the income payable to any such child pay to his or her guardian or guardians the sum of Rupees Five Hundred per month until he or she shall attain the age of eighteen years for the maintenance and education of such child and in every case my Trustee shall upon any child of me attaining the age of eighteen years pay to such child all and any balance of accumulation of income that there might be in his hands payable to such child. And as regards my grandchildren so long as any grandchild of me entitled to any income under this my will shall be under the age of eighteen years it shall be lawful for my Trustee to pay the whole or any part of such income to the guardian or guardians of such grandchild for his or her maintenance and education. I declare that my Trustee shall not be bound to see to the application of any moneys which he shall pay for the maintenance and education of my children or grandchildren or any of them under the provisions hereinbefore contained nor shall he be liable for any misapplication thereof".

Two sections of the Indian Succession Act, 1925, on which the case mainly depends must now be stated.

"113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed."

Illustrations.

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has had no son. Were the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(ii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughters living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void".

The second illustration is omitted as not being material.

"120. (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary to be applied for his benefit, the bequest of the fund is not contingent".

Two questions were raised by the originating summons issued by the appellants.

“(a) Whether the dispositions in regard to the residuary estate made by the said will are void save and except the life interests given thereby to the plaintiffs and the defendant Susan Sopher.

(b) Whether subject to the life interests given in the residuary estate to the plaintiffs and the defendant Susan Sopher the said plaintiffs and the defendant Susan Sopher have succeeded to the residuary estate of the testator as on an intestacy”.

Section 113 of the Act raises or may raise questions of very great difficulty, and their Lordships do not propose to attempt to express their views on questions of construction which are not relevant to the present appeal, and on which they have not the advantage of knowing the opinions of the learned Indian Judges. It may be observed that in the present case the attention of the Judges was not called to some of the points arising on the section which were argued on this appeal, and if the Board differs from the judgments under discussion the circumstance may well be due to that fact. The section must, of course, be read and construed in connection with the illustrations to be found in the Act. (See *Ariffin v. Gark*¹), and these must now be considered. The first illustration to the section shows that a bequest by a testator to his children for their respective lives and after their deaths to their children respectively, unborn at the testator's death, is void; for it is not a bequest of the whole interest that remains in the testator, since it is not certain that there will be any grand-children. A bequest to a son for life and after his death to his children who shall survive him must be bad for the same reason, since there may be no such children. The second and third illustration would seem to show—what is not very clear from the language of the section—that however complete may be the dispositions of the will, the gift after the prior bequest may not be a life interest to an unborn person, for that would be a bequest to a person not in existence at the time of the testator's death of something less than the remaining interest of the testator. How far this rule applies it is not necessary to determine in the present case; but the two illustrations show the strict sense in which the legislature has used the words “a bequest is made, etc., subject to a prior bequest”. It may be that a particular bequest must comprise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death; and it is clear that in cases like those two illustrations further gifts, however complete in their operation, do not save “the bequest”. Partial intestacy under the will as a whole is not the point. The question is whether “the later bequest” (whatever that means in a particular case) is a complete disposition of the testator's interest.

The construction of section 113 of the Act does not appear to have been much considered in reported cases, and the diligence of counsel has only resulted in the Board being referred to a single case which will now be referred to. The case is that of *Putlibai v. Naoroji*,² and it is reported in 28 C. W. N. page 737 after it had come to this Board on appeal. It was decided in 1923, and related to sections 99, 100, 101 and 102 of the Indian Succession Act (X of 1865) then in force. Section 100 is reproduced in the modern Indian Succession Act as section 113. The case is valuable as deciding that in interpreting wills with reference to sections 113, 114 and 115 of the present Act, which are applicable to several different systems of jurisprudence, it is necessary to bear in mind that the words used must be understood with reference to the current meaning of the words apart from such technical considerations as are only appropriate in English law. Their Lordships propose in accordance with this view to construe the words of section 113 in the light, so far as that may be proper, of the various sections contained in Chapter VII of the Act relating to “void bequests” (where section 113 is found) according to their natural meaning without regard to the numerous decisions of the Courts in this country. Section 113, it will be noted, relates to cases where two factors exist, first, that the bequest is made to a

1. (1916) L.R. 43 I.A. 256.

2. (1923) 28 C.W.N. 737.

person not in existence at the time of the testator's death, (e.g. to unborn persons at that date), and secondly, that there is a prior bequest contained in the will. The case cited referred to the very elaborate will of a Parsi. Clause (11) of the will gave interests for life to his five sons and provided that if a son died the persons presumptively entitled to the corpus of the estate were to have the income till the death of the last survivor of the five sons. Clause (12) contains special powers of appointment which were given to each son. Clause (13) provided for the event of default of the exercise of the powers of appointment and contained a gift to sons of each son or his issue as therein mentioned. There were also two clauses (15) and (16), which provided for the forfeiture of the interests of the unborn beneficiaries in certain contingencies. It was decided in the High Court of Judicature at Bombay that the limitations to take effect under clauses (11), (12) and (13) after the death of each son were all void under section 100, as the bequests did not comprise the whole of the testator's interest in the thing bequeathed. The Court took the same view as to the result of clause (16). The Board did not consider it desirable to decide all the points raised in the Court of Appeal, but they did affirm the decision of the Court as to clauses (11), (12), (13) and (16) of the will. In effect the Board ~~thought~~ it sufficient to decide that the bequests to the sons, daughters, widows and issue were void because they did not in all possible instances dispose of the subject-matter to which they apply. The bequests failed to comprise the whole of the testator's remaining interest, because "there were contingent rights which might well prove to be of value". It is at least consistent with that decision to hold (as was argued in that case) that if under a bequest in the circumstances mentioned in section 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed. That is the conclusion at which their Lordships have arrived on the words of the section read in conjunction with the other sections relating to void gifts.

If we now turn to the clause in the will relating to the surplus income during the widow's life-time, their Lordships are of opinion that the interest of a grand-child in that income during the period until the death of the widow is contingent on his surviving his parent. The language shows clearly that no grand-child is to receive any income unless and until he survives his father. Further, if no child or grand-child survives the widow, there will be an intestacy as regards the surplus income.

It seems to their Lordships that the "thing bequeathed" in the circumstances of this case is the residuary estate of the testator, and none the less that the clause above dealt with relates only to the income of that fund until the death of the widow. The three illustrations to section 113 above set out support that view. If this be correct all the bequests or dispositions after the death of the widow would appear to be rendered void by the section.

It was, however, also argued that the gifts to the grand-children of shares in the corpus are contingent on their respectively attaining the age of 18 and also on their surviving their respective fathers. If correct, this would be a further ground for holding that section 113 applied. The suggested answer to the contention was based on section 120 of the Act, or, to be more precise, on the "exception" contained in that section, which must now be considered. It must be observed that the exception applies only to the case where a fund is given to any person "on his attaining a particular age". It has no relation to any other contingency, e.g., to his surviving a named person. In that case the legacy bequeathed does not vest until the legatee survives the named person [see section 120 (1)]. What then happens if the legacy is given subject to a double

contingency, *e.g.*; that the legatee must survive a named person and must also attain a particular age? In the present case that is the position, for on the words of the will the children of either son of the testator are not given any interest in the corpus merely on attaining the age of 18, they also have to survive their father. It is true that if a son dies leaving no children who survive him, his share is the subject of a gift over to the other son if he survives the son who has so died; but plainly there may be an incomplete disposition of the subject of the bequest if both sons die without issue or if one son dies without leaving issue and the other son is then dead. The material point is that the gifts of corpus to grand-children are subject to the double contingency unless the exception to section 120 applies and makes them vested.

Their Lordships are of opinion that the exception does not apply because it cannot be said that the fund or any part of it is given to any grand-child "upon his attaining the age of 18". He may attain that age and yet will get no interest in the corpus if he predeceases his father. The gifts of corpus to the grand-children are therefore contingent, and on the view expressed above as to the true construction of section 113, it must follow that the bequests to them are void, since these bequests do not comprise all the interest of the testator. Their Lordships must observe that this point on section 120 does not appear to have been argued before the Indian Courts.

In the result, and on the grounds stated, the decrees of the Courts below should be set aside except as to costs and the two questions raised in the case must be answered in the affirmative. In the circumstances the costs of all parties as between solicitor and client should be paid out of the estate.

Their Lordships will humbly advise His Majesty accordingly.

K. S.

Appeal allowed.

[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD MACMILLAN, LORD CLAUSON AND SIR GEORGE RANKIN.

The Madras and Southern Mahratta Railway Co., Ltd. ... *Appellants**

v.

The Bezwada Municipality ... *Respondents.*

Madras District Municipalities Act (V of 1920), section 82 (2), Proviso—Levy of property-tax—Ascertainment of annual value—Resort to capital value as a means of getting at annual value in cases not covered by proviso—Not prohibited by implication—Interpretation of statutes—Function and scope and effect of proviso.

The proviso to section 82 (2) of the Madras District Municipalities Act does not say that the method of arriving at the annual value by taking a percentage of the capital value is to be utilised *only* in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates.

The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case.

Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.

Accordingly a municipality within whose limits certain properties are situate is not precluded from adopting a percentage of the capital value of such lands as a method of ascertaining their annual value for the purpose of the imposition of property-tax merely by reason of the fact that this method is specifically enjoined in the particular instances mentioned in the proviso and that their lands are not included in these instances.

(1941) 2 M.L.J. 189, affirmed.

Consolidated appeals from the judgment† and decrees of the High Court, Madras (Pandrang Row and Somayya, JJ.) in the Civil Appellate Jurisdiction dated 29th January, 1941, affirming the decrees of the Subordinate Judge of Bezwada, dated the 31st March, 1937.

Their Lordships' Judgment was delivered by

LORD MACMILLAN.—The appellants, the Madras and Southern Mahratta Railway Company, Limited, own certain vacant lands within the Municipality of Bezwada. These lands are admittedly subject to the property tax which the respondents, the Bezwada Municipality, are empowered to levy. The question for decision in these consolidated appeals is whether the respondents acted within their statutory powers in ascertaining the annual value of the lands for the purpose of imposing the tax.

The method which the respondents adopted in order to arrive at the annual value of the lands was first to ascertain their capital value, which they did by reckoning them at so much per square yard, and they then took 6 per cent. of the capital value as representing the annual value. On the annual value so calculated they imposed property tax at the rate of 16½ per cent. per annum. The appellants under protest paid the assessments made upon them in each of the four financial years ending on 31st March in 1932, 1933, 1934 and 1935. They now seek to have these payments refunded as having been illegally exacted. In this they have been unsuccessful in both the Courts in India.

Many points were raised and many topics were discussed in the course of the proceedings in India, but before their Lordships the appellants both in their printed case and in their arguments at the bar concentrated upon one main ground of attack, namely, that on a sound construction of the respondents' statutory powers the method adopted by the respondents of fixing the annual value of the lands in question was not permissible. If they failed to make good this point, the appellants did not contend that they could otherwise succeed.

The taxing powers of the respondents are conferred upon them by the Madras District Municipalities Act, 1920, as amended by subsequent legislation. Their Lordships take the Act as it stood at the relevant period. By section 78 every municipal council is empowered to levy *inter alia* a property tax and any resolution of a municipal council determining to levy a tax is required to specify the rate at which and the date from which it shall be levied.

Sections 81 and 82 deal with the levying and assessment of property tax and the argument turned upon the interpretation of these sections. So far as material to the present question they read as follows:—

• "Section 81. (1) If the Council by a resolution determines that a property-tax shall be levied, such tax shall be levied on all buildings and lands within municipal limits save those exempted by or under this Act, or any other law. The property-tax may comprise—

• (a) a tax for general purposes;

• (b) a water and drainage-tax.

* * * * *

• (2) Save as otherwise provided in this Act, these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the Municipal Council, subject to the provisions of section 78.

• (3) The Municipal Council may, in the case of lands which are not used exclusively for agricultural purposes and are not occupied or adjacent and appurtenant to, buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands, as it may fix:

Provided that such percentages or rates shall not exceed the maxima, if any, fixed by the Local Government and that the capital value of such lands shall be determined in such manner as may be prescribed.

• (4) (a) The municipal council may, in the case of lands used exclusively for agricultural purposes levy these taxes at such proportions as it may fix of the annual value of

such lands as calculated in accordance with the provisions of section 79 of the Madras Local Boards Act, 1920.

* * * * *

Section 82 (1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction, *in the case of buildings only*, of ten per centum of such annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever.

Provided that—

(a) in the case of—

- (i) any Government or railway building; or
- (ii) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the executive authority, be estimated the annual value of the premises shall be deemed to be 6 per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost."

* * * * *

By a resolution, dated 29th January, 1932, the respondents resolved to levy property tax within their municipality at certain special rates. The terms of this resolution give rise to some questions but the assessment on the appellants was not challenged by them before their Lordships on the ground that there had been no effective resolution to levy property tax.

It will be observed that under section 81 (2) the property tax, save as otherwise provided in the Act, is to be levied at a percentage of "the annual value of lands or buildings or both." Sub-section (3) otherwise provides inasmuch as it permits, but does not enjoin, the levying of the tax "in the case of lands which are not used exclusively for agricultural purposes and are not occupied by or adjacent and appurtenant to buildings" either at a percentage of the capital value of such lands or at such rates with reference to the extent of such lands as the municipal council may fix, subject to compliance with the proviso to the sub-section. If either of the alternative methods permitted by sub-section (3) is adopted, the assessment is not on annual value. Appropriate as this sub-section was to the case of the appellants' lands, the respondents did not in fact avail themselves of it in making the assessment complained of. In particular, they did not levy the tax at the percentage of the capital value of the appellants' lands: they levied it at a percentage on their annual value.

Section 82 (2) prescribes how the annual value of lands and buildings is to be ascertained. It is to be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year, less 10 per cent. in the case of buildings. The spectre of the hypothetical tenant, so familiar an apparition in English rating law, is here invoked. The appellants did not dispute that, if this sub-section had not had a proviso appended to it, it would have been open to the respondents to resort to any of the recognized methods of arriving at the rent which a hypothetical tenant might reasonably be expected to pay for the lands in question including the method of taking a percentage of their capital value. But the proviso, they say, makes all the difference. It expressly enjoins resort to this last-mentioned method of arriving at the annual value in the case of two specified classes of buildings. Therefore, they say, resort to this method is by necessary implication prohibited in every other case, and in particular in the case of their lands. The respondents contest this reading and maintain that the proviso does not impliedly prohibit resort to capital value as a means of getting at annual value in every case not covered by the proviso, and that the chief purpose of the proviso is to be found in the limitation to 6 per cent. which it contains.

Their Lordships cannot accept the appellants' argument which in their opinion involves misrepresentation of the effect of the proviso. The proviso does

not say that the method of arriving at annual value by taking a percentage of capital value is to be utilised *only* in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as it concerns the particular subjects to which the proviso relates. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

It follows that in their Lordships' opinion the respondents were not precluded from adopting a percentage of the capital value of the appellants' lands as a method of ascertaining their annual value for the purpose of the imposition of property tax merely by reason of the fact that this method is specifically enjoined in the particular instances mentioned in the proviso and that their lands are not included in these instances.

This is sufficient for the disposal of the case as presented before their Lordships. Before taking leave of it, however, they think it right to advert to certain matters which were incidentally brought to their notice. The resolution already referred to by which the respondents resolved to levy property tax consists of two paragraphs. The first imposes property tax in general under section 81 at a percentage of annual value for each component of the tax; the second imposes what it calls "land tax", presumably a species of property tax (1) on agricultural lands at 6 per cent. per half year and (2) "on other lands which fall under the category specified in section 81 (3) at $\frac{1}{2}$ per cent. of the capital value per half year". From this it would appear that the respondents were originally minded to exercise the option conferred upon them by section 81 (3) and to assess lands such as those of the appellants not on annual value but on capital value. The Local Self-Government Department, however, took exception to this part of the resolution on the ground that the proviso to section 81 (3) required capital value to be "determined in such manner as may be prescribed"; that "prescribed" by section 3 (19) meant "prescribed by the local government by rules made under this Act"; that no such rules had been made; and that consequently the portion of the resolution in question was unwarranted and could not receive effect. Before their Lordships the appellants supported this view. The respondents on the other hand maintained that if no rules were made, they were nevertheless entitled to avail themselves of the capital method of valuation under section 81 (3) unfettered as to the manner in which they might determine capital value. In this they have the support of the judgment of the High Court. It seems that rules have now been made but railway lands are expressly excluded from their operation.

The respondents do not appear to have rescinded the part of their resolution alleged by the department to be incompetent or to have passed any amending resolution. So far as the appellants' lands are concerned, they seem simply to have ignored it, and to have invoked instead section 82 (2). They submitted an argument to the effect that the resolution did no more than fix the rates of the tax to be levied but did not commit the respondents to assessing any particular class of subjects in any particular way. The appellants not unnaturally do not seem to have objected to a departure from the capital value method under section 81 (3), for 1 per cent. per annum on capital value is more than $16\frac{1}{2}$ per cent. on annual value calculated at 6 per cent. on capital value.

It is manifest that these topics are eminently debatable. As, however, the respondents did not in point of fact proceed under section 81 (3); as the appellants, so far from saying that they should have done so, maintained that the respondents could not lawfully have done so; and as the controversy before their Lordships was confined to the mode of ascertaining annual value under

section 82 (2), their Lordships, while mentioning those other topics, do not feel called upon to make any pronouncement upon them and confine themselves to the matter which alone was directly raised before them and on which they have already expressed an opinion adverse to the appellants. There having in their Lordships' view been compliance in substance and effect with the provisions of the Act, within the meaning of section 354 (2), the appellants cannot recover the assessments which they have paid.

Their Lordships will accordingly humbly advise His Majesty that the consolidated appeals be dismissed. The appellants will pay the respondents' cost of the appeals.

K.S.

Consolidated appeals dismissed.

[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—VISCOUNT MAUGHAN, LORD MACMILLAN AND LORD WRIGHT.

Chambers

.. Appellant*

v.

Chambers and others

.. Respondents.

Trusts Act (II of 1882), sections 5 and 6—Essentials for constitution of a valid trust of a fund—Absence of an ascertained or appropriated trust fund or any declaration of trust—Effect.

C, who was carrying on a business under the style of "C. L. Company" (which was only an *alias* for himself), for the purpose of making provisions for his wife and children and to prevent his estate becoming liable for death duties, purported to treat the company as if it had an independent being and caused entries to be made in the books of the company crediting his wife, children and certain other relatives with various sums of money and debiting his capital account with those sums. Later C wrote to the company directing it to make additions to the various amounts so as to raise the capital at the credit of the various relations, debit such additions to his account and intimate the same to the relations as per his own signed draft. The company accordingly intimated to the wife and other relatives individually about the crediting, stating that the amount was in the nature of a personal gift from C to the addressee and that the amount will bear interest at 6 per cent. per annum payable half yearly. The communication further said, "so long as the C. L. Company remains a private company you will not be entitled to withdraw more than 10 per cent. of the capital per annum. In the event of this company being converted into a limited liability company you will be issued 6 per cent. preference shares to the value of the amount standing at your credit at that date. The preference shares will be subject to the same restrictions, namely, you will not be permitted to place these shares on the market to a greater extent than 10 per cent. annually."

Subsequently a further sum was credited to the wife and afterwards retransferred to the capital account of C. In the balance sheets of the company the sums to the credit of the wife were entered at first as "deposits" and subsequently as "unsecured loans". At her death in 1924 the wife left a will disposing of the amount at her credit and in 1930 accounts were opened by the company in the names of the beneficiaries under the will showing them as creditors in respect of shares in the amount which had stood to her credit at her death as apportioned by her will. Letters waiving payment of interest were signed by the beneficiaries in 1931 in order to satisfy the company's auditors. In December, 1932, C, claiming that the credits were not supported by consideration and disclaiming any liability to pay interest caused all the amounts credited to the beneficiaries under the will and to the other relatives to be re-transferred to his own capital account in the company's books and all the credit accounts were cancelled and closed. C's son as executor under his mother's will protested against this action and in 1939 took out an originating summons in the High Court for deciding whether there was a valid and completed gift to the wife by C, or in the alternative a valid declaration of trust in her favour. On an appeal to His Majesty in Council the decision of the Courts in India that the legal requirements of a gift had not been satisfied was not challenged. On the question whether a trust in favour of the wife had been constituted,

Held, that the subject-matter was not clearly ascertained. There was no setting aside and appropriation of a sum by C, as a fund transferable to the wife. There was nothing in the present case tantamount to a declaration of trust at all and there was never any

absolute parting by C with the alleged subject-matter of the trust. Accordingly no valid trust was constituted.

(1940) 2 M.L.J. 963, affirmed.

Appeal from the judgment and decree of the High Court, Madras (Leach, C.J. and Horwill, J.) in its Civil Appellate Jurisdiction, dated 20th August, 1940 from the judgment and order, dated 28th day of April, 1939 (Gentle, J.) passed in the Ordinary Original Civil Jurisdiction of the same Court.

Their Lordships' Judgment was delivered by

LORD MACMILLAN.—The late George Alexander Chambers of Madras, being minded to make provisions for his wife and children and other relations, and being also animated with the less laudable desire to prevent the Government of India, as he put it, from "grabbing death duties" on the whole of his estate, took certain steps which he conceived would achieve these objects. The present proceedings are concerned with the question of the legal effect of these steps.

Mr. Chambers carried on business as a leather merchant in Madras under the style of the Chrome Leather Company. The business belonged to and was conducted by himself alone and the company name was no more than an *alias* for himself, but for the object he had in view he purported to treat the company as if it had an independent being.

At the time of the transactions about to be narrated Mr. Chambers' family consisted of his wife Ethel Mary Chambers, a son who is the present appellant, and two daughters, Phyllis Dora Chambers (Mrs. Michell) and Sheila Florence Chambers. His wife died in 1924. He married a second wife who died in 1927, leaving an infant son, who is the fourth respondent. In 1930, he married the first respondent as his third wife. The first, second and third respondents are the trustees and executors of Mr. Chambers, who died on 16th November, 1937, and the first respondent is also the guardian of her infant step-son, the fourth respondent. The appellant is the sole trustee and executor of his mother, the first wife of Mr. Chambers, hereinafter called "Mrs. Chambers."

In the year 1917, Mr. Chambers caused entries to be made in the books of the Chrome Leather Company crediting Mrs. Chambers, his children by her and certain other relatives with various sums of money and debiting his capital account in the company's books with these sums. Separate accounts were opened in the respective names showing the sums so credited. In particular in the case of Mrs. Chambers a separate account was opened in the company's books in May, 1917, showing two sums of Rs. 15,000 and Rs. 30,000 credited to her in that month. A further sum of Rs. 1,55,000 was credited to her account on 1st April, 1919, as a "transfer" from Mr. Chambers' "capital account."

On 25th July, 1919, Mr. Chambers wrote a letter to the company in the following terms:—

"Dear Sirs,

With reference to the amounts at present standing to the credit of my wife and children in your books, please make such additions thereto as may be required so that as from April 1st last the capital at their credit in the firm is as follow:—

Mrs. Chambers Rs. 2,00,000 (rupees two lakhs), Phyllis Michell Rs. 40,000 (rupees forty thousand), K. H. Chambers Rs. 40,000 (rupees forty thousand), S. F. Chambers Rs. 40,000 (rupees forty thousand). The additional sums now added please debit to my account.

Please note also that as and from the 1st April last these sums at their respective credits are to bear interest at 6 per cent. payable half yearly and when the Chrome Leather Company is converted (either with or without the business of Chambers & Co. into a Limited Liability Company—Preference shares at 6 per cent. with interest payable half-yearly are to be issued for the sums at their credit as stated above or such larger or lesser sums as may then be at their credit should they so desire. You have hitherto paid interest at 8 per cent. on the Rs. 45,000 which Mrs. Chambers has had with the firm, also on the

Rs. 15,000 which Mrs. Michell had. These payments may be deducted from the interest due on the 1st October, 1919, on the increased capital bearing interest at 6 per cent.

You will also please credit my two sisters Emma Elizabeth Bolton and Helena Alice Worcester with Rs. 15,000 each at the same interest and on the same terms as for my wife and children, and also Rs. 7,500 (rupees seven thousand five hundred) to each of my brothers Arthur William Chambers and his eldest son Bob Chambers and Charles Henry Chambers and his eldest son Leslie Chambers on the same terms as above.

Kindly communicate with each as per signed draft enclosed making the necessary alterations with regard to the amounts.

Yours faithfully,
(Sd.) G. A. CHAMBERS."

On 6th August, 1919, the company, in pursuance of the concluding sentence of the foregoing letter, wrote to Mrs. Chambers a letter the terms of which are agreed to have been as follows:—

"MRS. CHAMBERS,
Madam,

In accordance with instructions received from Mr. Chambers we have this day placed the sum of Rs. 1,55,000 to your credit, thus making a total of Rs. 2,00,000. This sum is entirely in the nature of a personal gift from Mr. Chambers to yourself, and will bear interest at the rate of 6 per cent. per annum, payable half yearly, commencing from the 1st April last, viz., 1919. Our next payment to you will be on 1st October, when you will receive interest on the Rs. 2,00,000 at 6 per cent. less payments already made to you on the Rs. 45,000 at the rate of interest of 8 per cent.

We wish you to understand that so long as the Chrome Leather Company remain a private company you will not be entitled to withdraw more than 10 per cent. of the capital (namely Rs. 2,00,000) per annum. In the event of this company (Chrome Leather Company) being converted into a limited liability company, either with or without the business of Chambers & Co., you will be issued 6 per cent. preference shares to the value of the amount standing at your credit at that date. These preference shares will be subject to the same restrictions, namely, you will not be permitted to place these shares on the market to a greater extent than 10 per cent. annually.

We trust this matter is perfectly clear.

Yours faithfully,
THE CHROME LEATHER COMPANY."

Similar letters were also sent to the children and other relations of Mr. Chambers who had credit accounts in the company's books.

On 1st October, 1919, Mr. Chambers caused a further sum of one lakh of rupees to be credited to Mrs. Chambers in a separate account in the company's books in terms of a letter to that effect which he addressed to the company. Interest was credited to Mrs. Chambers on the various amounts at her credit and there was a separate interest account to which personal and other outgoings were debited.

On 3rd March, 1924, Mrs. Chambers wrote to the company requesting that any sum in excess of two lakhs of rupees standing at her credit should be re-transferred to the capital account of Mr. Chambers and this was done.

In the balance sheets of the company the sums at the credit of Mrs. Chambers were entered at first as "deposits" and subsequently as "unsecured loans."

On the death of Mrs. Chambers in 1924, she left a will in which she referred to the two lakhs "deposited" on her behalf with the company as belonging to her. No interest was credited to her account after about November, 1924, when the National Bank of India, Limited, to which the business was largely indebted, objected. In 1930 accounts were opened in the names of the beneficiaries under the will of Mrs. Chambers, showing them as creditors in respect of shares in the amount which had stood to her credit at her death as apportioned by her will. Letters waiving payment of interest were signed by the beneficiaries under the will of Mrs. Chambers in 1931 in order to satisfy the company's auditors.

In December, 1932, Mr. Chambers caused the two lakhs which had been proportionately credited to the beneficiaries under the will of Mrs. Chambers as well as all the other similar credits in favour of his children and relations to

be re-transferred to his own capital account in the company's books, and all the credit accounts were cancelled and closed. Mr. Chambers appears to have taken this action in consequence of advice received by him from a lawyer brother in Canada to the effect that none of the parties to whom he had caused sums to be credited in the company's books had any legal claim thereto, in consequence of the absence of any consideration. On 12th November, 1932, he had written to the company's auditors a letter containing the following passage:—

"Certain transfers from my capital in our books were made of my own free-will and I have no intention of cancelling same, but I have never received any loans and there was never any consideration either given or accepted, and as regards payment of interest I am under no obligation to anyone."

On the appellant being apprised of what Mr. Chambers had done he at once protested against his action as an unwarranted repudiation of the liability he had undertaken to Mrs. Chambers. If Mr. Chambers had constituted himself a trustee, his action was plainly a fundamental breach of trust.

The present proceedings were initiated in 1939 by the appellant who, as the executor of the will of his mother Mrs. Chambers, took out an originating summons in the High Court at Madras. The main question formulated for decision was whether on the facts and circumstances there was a valid and completed gift of the sum of two lakhs of rupees to Mrs. Chambers by Mr. Chambers or in the alternative, a valid declaration of trust in respect of two lakhs in her favour.

Both the Courts in India held that the legal requirements of a gift had not been satisfied and the appellant has not pursued this point on appeal to His Majesty. Gentle, J., however, in the Court of first instance, was of opinion that a valid trust in favour of Mrs. Chambers had been created and he so decided. On an Original Side Appeal the contrary was held by Sir Lionel Leach, C.J., and Horwill, J.

The only question argued before their Lordships was whether a trust in favour of Mrs. Chambers had been effectually constituted. On this question their Lordships heard a persuasive argument by Mr. Wynn Parry but in their opinion the contention is untenable in law. In India the law of trusts is codified in the Trusts Act (II of 1882) and when the provisions of that Act are consulted, the appellant's case is found to break down at the very threshold. If there is one thing clear it is that there can be no trust unless its subject-matter is clearly ascertainable. Section 8 of the statute declares that "the subject-matter of a trust must be property transferable to the beneficiary." What then was the subject-matter of this alleged trust? Mr. Justice Gentle seems to have been of opinion that it was a fund of two lakhs of rupees. But that was not so. No such sum was ever set aside and appropriated by Mr. Chambers as a fund transferable to Mrs. Chambers of which he was to be a trustee with all the consequential obligations of such a position. At the most it was an attempt to give Mrs. Chambers an interest in the capital of his business to be measured on the basis of her having contributed two lakhs. The entire business, including the share in it which he had purported to credit to Mrs. Chambers, remained entirely under the unfettered control of Mr. Chambers. There was never any trust estate which the Court could administer.

Sensible of this difficulty, counsel for the appellant did not attempt to support the view of Gentle, J., as to the subject-matter of the trust. He sought to define it as a sum of money to be paid out of the business (at an uncertain date) after the creditors were satisfied, to be measured by the proportion which two lakhs should bear to the total capital left. This, if anything, has a resemblance to partnership rather than trust. Such a subject-matter in their Lordships' opinion does not answer the requirements of Indian trust law, and immediately raises other and inextricable difficulties both of form and of substance. Thus, so far as the surplus assets of the business, if any, should consist of immovable

property, the provisions prescribed by section 5 of the Act requiring a registered instrument in writing would require to have been observed and they have not been.

There being no ascertained and appropriated trust fund, the case for the constitution of a trust necessarily fails. But there are other insurmountable obstacles in the appellant's way, which are fully discussed by the learned Chief Justice in the light of the authorities on the subject. The requisites for the constitution of a valid trust are prescribed by sections 5 and 6 of the Indian Trusts Act. These read as follows:—

"5. No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

6. Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust; (b) the purpose of the trust; (c) the beneficiary; and (d) the trust property, and (unless the trust is declared by will, or the author of the trust is himself to be the trustee) transfers the trust property to the trustee."

There are difficulties, which it is unnecessary for their Lordships to discuss, as regards the interpretation and precise relation of these two sections, but it is plain that on any view there has not in the present case been compliance with the statute. There is no non-testamentary instrument in writing signed by the author of the trust or the trustee declaring the trust. The letter of 6th August, 1919, which Mr. Justice Gentle held to amount to a declaration of trust expressly states the contrary. The two lakhs placed to the credit of Mrs. Chambers are therein described as "entirely in the nature of a personal gift from Mr. Chambers" to her. Mr. Chambers never indicated with reasonable certainty by any words or acts an intention on his part thereby to create a trust. His acts were throughout inconsistent with any such intention. As to the trust property, it has already been pointed out by their Lordships that there was no such ascertainment and appropriation as the law requires.

Their Lordships in reaching their conclusion adverse to the appellant have proceeded upon the terms of the Indian Trusts Act, but the general principles of trust law applicable to the case, as the learned Chief Justice points out, are the same in India as in England, and the English authorities which he cites fully justify the view taken by him and his colleague.

In the present case there was nothing tantamount to a declaration of trust at all and there was never any absolute parting by Mr. Chambers with the alleged subject-matter of the trust.

The appeal accordingly fails and their Lordships will humbly advise His Majesty that it be dismissed and that the judgment of the High Court of 20th August, 1940, be affirmed. The appellant will pay the respondents' costs of the appeal.

K.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Uduman Taraganar

*Petitioner (Accused).**

Defence of India Rules (1939), rule 81 (4)—Food Grains Control Order (1942), Clause (3)—Storage of paddy in wholesale quantities without licence for sale at a future date is an offence under.

As the words "in wholesale quantities" occurring in clause (3) of the Food Grains Control Order (as it stood in March, 1943) govern the previous words purchase, sale and storage,

*Crl. R.C. No. 986 of 1943.

10th February, 1944.

(Crl. R.P. No. 928 of 1943).

the storage also "in wholesale quantities" for purposes of sale without a licence is prohibited. It cannot be said that it was only storage for purposes of fulfilling the terms of a contract entered into beforehand for sale in wholesale quantities that should be considered to have been constituted an offence. If a person undertakes to trade and if he stores food grains "in wholesale quantities" for sale in future under contracts to be entered into in the future, he will still be guilty of the offence punishable under clause (3).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session, Tinnevely Division dated 31st August, 1943, and passed in Criminal Appeal No. 70 of 1943 (C.C. No. 163 of 1943, Additional First Class Magistrate, Tinnevely).

K. E. Rajagopalachari for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted by the Additional First Class Magistrate of Tinnevely for an offence punishable under rule 81 (4) of the Defence of India Rules and sentenced to pay a fine of Rs. 200. The charge against him was that he stored $31\frac{1}{2}$ bags of rice (each bag containing 45 measures weighing two maunds). This was noticed by the Commercial Tax Officer when he visited the petitioner's shop on the 21st March 1943. The accused admitted the storage and pleaded guilty. The Magistrate found that the storage was made for sale, that the quantity stored exceeded 20 maunds and hence found him guilty and sentenced him as stated above. On appeal the learned Sessions Judge of Tinnevely reduced the sentence to a fine of Rs. 50 and confirmed the conviction.

It is now urged before me that the words "storage for sale in wholesale quantities" were not defined in the rules as they stood on the date of the offence and that rule 3 of the Notification prohibited only storage for sale in wholesale quantities and not storage in wholesale quantities for purposes of sale. It is true that the expression "storage for sale in wholesale quantities" has been subsequently defined as meaning storage for purposes of sale, whether the sale is in wholesale quantities or in retail. But then in rule 3 as it stood on the date of occurrence, after the word "purchase" there was a comma, after "sale" a second comma, after "or storage for sale" a third comma and then came the words "in wholesale quantities" indicating thereby that that phrase governed the words purchase, sale and storage. Therefore it was the storage in wholesale quantities for purposes of sale that was prohibited. It is true the expression "wholesale quantities" was not separately defined. But then the words "sale in wholesale quantities" as well as "purchase in wholesale quantities" have been defined, and they clearly indicate that by "wholesale quantities" was meant "more than 20 maunds." Admittedly the petitioner stored more than 20 maunds and there was therefore a storage in wholesale quantities, and since the storage was for sale the petitioner was guilty.

My attention is drawn to the ruling of my learned brother, Horwill, J., in C.A. No. 934 of 1943, in which it was observed that it was only storage for purposes of fulfilling the terms of a contract entered into beforehand for sale in wholesale quantities that should be considered to have been constituted an offence. In other words the rule was construed as meaning that it is only in cases where a person stores foodgrains for the purpose of fulfilling a contract entered into beforehand for sale of foodgrains in excess of 20 maunds that it could be said that an offence had been committed under the rules. With great respect to my learned brother, I do not think it is only storage in connection with a contract entered into before the storage that was prohibited. The rule runs thus:

"No person shall engage in any undertaking which involves the purchase or sale or storage for sale in wholesale quantities of any foodgrains except under and in accordance with the license issued"

An undertaking might be a unilateral act. The word "undertaking" means "an enterprise" and the enterprise in this case is that of a trader. If a person undertakes to trade and if he stores foodgrains in wholesale quantities for sale in future under contracts to be entered into in the future, he will still be guilty of the offence punishable under rule 3.

I therefore find that the petitioner was rightly convicted for the offence with which he was charged, and the sentence as reduced by the learned Sessions Judge cannot be said to be excessive.

The petition is dismissed.

V. S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE HORWILL.

A. C. T. N. Chidambaram Chettiar and another

Appellants

v.

A. C. T. N. Nagappa Chettiar and others

Respondents.

Court-Fees Act (VII of 1870), section 7 (iv) (a)—State for declaration that a compromise decree passed in a prior suit was not binding on the plaintiffs—Reliefs estimated at Rupees Two lakhs—Ad valorem court-fee to be paid.

A suit was brought for a declaration that a compromise decree passed in a prior suit wherein the plaintiffs, then minors, had been represented originally by their mother as next friend and later on by their father was not binding on the plaintiffs. There was nothing to show that the father's interests in that suit were in any way adverse to those of the minors and it appeared that their interests were very much identical. The plaintiffs estimated the value of the reliefs at two lakhs of rupees. On the question whether *ad valorem* court-fee should be paid,

Held, that *ad valorem* court-fee should be paid under section 7 (iv) (a) of the Court-Fees Act, as the spirit and real meaning of the plaint was for the cancellation of the prior decree.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, dated 28th February, 1942, and passed in O.S. No. 26 of 1940.

V. Ramaswami Aiyar for Appellants.

K. Bhashyam Aiyangar, T. R. Srinivasan, R. Ramaswami Aiyangar and R. Desikan for Respondents.

The Judgment of the Court was delivered by

King, J.—This appeal arises out of a suit originally brought as O.S. No. 205 of 1938 in the Court of the learned Subordinate Judge of Devakottah. It was re-numbered as O.S. No. 26 of 1940 and disposed of by the learned Subordinate Judge of Ramnad. The suit was by two brothers in a Nattukottai Chetty family and was brought for a declaration that a compromise decree passed in 1939 was not binding on them. That decree was passed in a suit originally filed in 1924 by the two plaintiffs and their father. That suit was based upon an agreement of 1921 by the father of the plaintiffs with the other members of the family and the object of the suit was to set aside that agreement as having been extorted from the father of the present plaintiffs in circumstances which would make it not legally binding upon him. In the suit of 1924 the present plaintiffs who were then minors were at first represented by their mother as next friend, but it is clear that they and their father jointly filed a single plaint and were represented by a single legal adviser. While the suit was pending, the plaintiffs' father entered into a compromise with the defendants. On the 6th November, 1929, orders were passed by the Court substituting the plaintiffs' father as their next friend in place of the plaintiffs' mother. On the 7th November, the plaintiffs represented by their father, their father himself and the defen-

dants in that suit filed a memorandum of compromise which was certified by the Court to be for the benefit of the minors concerned and formed the basis of the decree. As already stated the plaintiffs now seek to have it declared that this compromise and decree are not binding on them.

The court-fee paid by the plaintiffs was Rs. 500 under Article XVII-A of Schedule II Court-Fees Act and this court-fee was held by the learned Subordinate Judge to be correctly paid in spite of objections raised to it by the defendants. The suit was in due course disposed of and the present plaintiffs have now approached this Court in appeal. Under section 12 (ii) of the Court Fees Act if it appears to the Court of appeal that the decision of the Court of first instance on a question of court-fee is wrong and to the detriment of the revenue the appellant may be required to pay such additional fee as would have been payable had the question been rightly decided and this is the matter which is now before us.

It is contended for the appellants that the decision of the Court of first instance is correct, and that it is impossible to value in terms of money the relief which the plaintiffs seek in this suit. On the other hand, the respondents rely upon section 7 (iv) (a) and say that the suit ought to be valued *ad valorem* upon reliefs which the plaintiffs themselves estimate at rupees two lakhs. It seems to us upon a careful investigation of the plaint that the contention of the respondents and the Court Fee Examiner is correct. It is true that the plaintiffs do not in terms ask for a cancellation of the decree in the previous suit, but it will be obvious from what has been said as well as from a scrutiny of the plaint that before the plaintiffs can obtain any decree in this suit, the decree in the previous suit must of necessity be cancelled. It is however argued that there is no need legally to cancel the previous decree because it is a mere nullity. It is not binding upon the plaintiffs in any sense of the word as the plaintiffs were not properly represented at the time when it was passed. The plaint sets out that the plaintiffs' father was not appointed as their next friend until after he had irretrievably committed himself to receiving a particular sum under the compromise, which he was then effecting with the defendants in that suit, and that he was therefore precluded from exercising any kind of independent judgment in the interests of his sons. Therefore the plaintiffs' father must be deemed to be a person whose interests were adverse to those of his sons and no minor party to a suit can possibly be properly represented by any one whose interests are adverse to him. We are unable to agree with this appreciation of the situation. It is clear from the records in the previous suit that the interests of the father and his sons were identical and that all three were joining together to pursue them. There has been nothing whatever suggested other than the reprehensible conduct of the defendants in that suit to show that even in effecting a compromise, the father's interests were in any way adverse to those of his children. He was doing the best he could, subject to the superior subtlety of the defendants, to settle the matter in dispute and the result of that settlement was to benefit himself and his sons equally. There can, we think, be no justification for the view that at any time during the progress of the previous suit, there was any adversity of interest whatever between the present appellants and their father. If this is so, it cannot now be argued that the present appellants were improperly represented, and therefore not parties to the decree in the previous suit. If they were parties to that decree it follows inevitably that they can get no relief in the present suit without having the decree cancelled. Though they may not ask specifically for the cancellation of the decree, we must look at the spirit and real meaning of the plaint and hold that such a prayer is necessarily implied in it. It is clear to us therefore that this is a plaint which does fall *prima facie* under section 7 (iv) (a).

The only question that remains is whether the decree against the plaintiffs is one which can be assessed at a money value. It seems to us that that is a

task of no difficulty, and as stated it has already been performed by the plaintiffs themselves. They have stated very clearly that the result of the decree in the previous suit is to deprive them of portions of the family property which they value at not less than two lakhs of rupees.

It has been held by the Master in dealing with the question of the proper court-fee to be paid on appeal that that court-fee is Rs. 2,632-7-0 as the court-fee payable *ad valorem* on a sum of rupees two lakhs. It is not now disputed by the learned counsel for the appellants that if court-fee ought to have been paid in the Sub-Court also upon two lakhs of rupees, that is the correct figure to fix. Rs. 500 has already been paid in the Subordinate Judge's Court. There remains therefore a deficit court-fee of Rs. 2,132-7-0 and time is granted to the appellants for five weeks from this date for the payment of that deficit court-fee. The appeal will be posted for further hearing on the 18th April.

V. P. S.

Ordered accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE SHAHABUDDIN.

East and West Life Insurance Co., Ltd.

.. Appellant*

v.

Kolla Venkiah and others

.. Respondents.

Insurance—Non-payment of premium and lapse of policy—Application for reinstatement containing false answers that assured was not sick at material time—Effect—Assured who knew only Telugu signing the answers to questions couched in English—Effect.

Though the practice of calling upon an insured person who knows only Telugu to answer questions couched in English cannot be commended the duty of making himself acquainted with the contents of what he was signing undoubtedly lies on the insured who makes an application for reinstatement of the policy which had lapsed by the non-payment of the premium on the due date, and he must be held responsible for the statements that he had had no sickness, ailment or injury since the last medical examination and had not been attended upon or prescribed for by any physician. Where the answers are not induced by any misrepresentation and are on the face of them untrue, in that the insured was contrary to his answers treated for arsenic dermatitis and was in a nursing home for five weeks before he was cured, the insurance company can legally repudiate liability under the policy, however free from danger the dermatitis may have been and however complete its cure.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla, dated 15th December, 1941 and passed in O.S. No. 31 of 1940.

P. Chandra Reddi for Appellant.

V. Govindarajachari and K. Krishnamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The question at issue in this appeal is whether the appellant the East and West Life Insurance Co., Ltd., is liable to pay to the respondent 1, Kolla Venkayya the sum due on a life policy issued to the respondent 1's brother, Kolla Janakiramayya, in December, 1935, for Rs. 15,000. The learned Subordinate Judge of Bapatla has granted a decree to respondent 1 for Rs. 12,862-13-0, after making certain deductions from the claim which do not now concern us, but has refused him costs. The company has appealed and respondent 1 has filed a memo. of cross-objections on the question of costs only.

The undisputed facts of the case are these. Premiums were due on the policy every six months. The premium due on 11th June, 1936, was not paid in time. The policy therefore lapsed, but under its terms could be reinstated on "evidence being furnished of good health to the satisfaction of the directors". In September, 1936, the premium was paid and the policy reinstated. In this connection an application form Ex.D-16 printed throughout in English, was signed in Telugu by Janakiramayya, who could not read or write English. In that form were (amongst others) two declarations.

(i) That since the day of my examination for the above-mentioned policy, I have had no sickness, ailment, or injury whatever except as follows:—

and (ii) I have not been attended, nor prescribed by any physician, except as follows:—

Under both of these declarations the word "none" was written in English by the company's agent in Bezwada (D.W.5). According to the final clause of the application form, the insured agrees that "if any of the statements or representations contained herein prove to be incomplete or untrue then this reinstatement shall be *ipso facto* null and void".

Now it is admitted that the answer "none" to these two declarations is in the literal sense of the word, and subject to a question of legal interpretation to be hereafter considered, untrue. From 13th February to 19th March, 1936, Janakiramayya was treated as an inpatient at a Mission Hospital in Chirala for arsenic dermatitis.

In December 1936 and January 1937 there was a second delay in the payment of premium, a second application form similarly filled up and signed and a second reinstatement, but the evidence and arguments in the case have centred round the facts of the first reinstatement and we need not therefore consider the later events. Janakiramayya died on 9th May, 1937, the cause of death being given on the certificate under the heading "other fevers".

The principal matter to be first considered is the circumstances in which Ex. D-16 came to be signed. The case for the company is that their agent, D.W-5 explained the contents of the form correctly in Telugu to Janakiramayya and wrote the words "none" on his instructions. The case for respondent 1, as outlined in his own evidence, as P.W.2, is that D.W.5 gave him Ex. D-16 at Bezwada (with the answers already filled in) and asked him to get Janakiramayya to sign it and return it by post. The learned Subordinate Judge deals with this matter in para. 13 of his judgment but does not come to any positive conclusion. He refers to a definite admission by D.W-5 as proof that he *could* not have correctly translated the first declaration into Telugu, but then goes on to point out the failure of D.W-5 to explain a discrepancy in date, from which the only reasonable inference would be to distrust D.W-5's evidence as a whole, and hold that the fact of any interview between him and Janakiramayya, in September, 1936, was not proved.

Mr. Govindarajachari who appeared for respondent 1 has thrown overboard his client's case as to the facts; and in order to rely upon the law as laid down in para. 600 (4) of Volume XVIII of Halsbury's Laws of England, and the case there quoted (*Joel v. Law Union and Crown Insurance Co.*) has asked us to hold that D.W-5 did meet Janakiramayya and intentionally misrepresented to him the meaning of the declarations. We are unable to accept this view.

We must point out in the first place that both P.W-2 and D.W-5 were giving evidence late in 1941, several years after the events of which they were speaking—it is difficult therefore to rely upon the memory of either, though in this respect it is more likely, we think that P.W-2 who was dealing in 1936 with his own and his brother's individual concerns, would retain a better recollection of what happened than D.W-5 to whom Janakiramayya's policy was only one of many to be considered in the ordinary routine of his duties. We are therefore unable to rely implicitly upon any admission by D.W-5 as being necessarily an admission of the truth.

In the second place, though we naturally speak here with some hesitation, we cannot agree with the learned Judge's own interpretation of D.W-5's evidence. The learned Judge says that D.W-5 was definitely asked how he inter-

preted to Janakiramayya the first declaration, and gave an answer in Telugu which excluded the possibility of his having asked him anything more than whether he was there and then in good health. That D.W-5 would make an admission thus cutting at the root of the company's case (which he had upheld in examination in chief) is in the highest degree improbable. The original record of D.W-5's evidence in the Judge's own hand is obscure and very nearly illegible, but it does establish, we think, that the question put to D.W-5 was recorded, and that that question could not possibly have been "how did you translate or explain the first declaration?"

Finally, in our opinion, a consideration of the documents makes it extremely probable that there was no interview between D.W-5 and Janakiramayya. The receipt, Ex.P-3 shows that the premium was paid to D.W-5 at Bezvada on 11th September. The application form was dated 19th September. It was this discrepancy that D.W-5 was unable to explain, and we are not surprised at his inability. If the parties had met in person it was surely inevitable that both these matters of business, the payment of the premium and the execution of Ex.D-16, would have been attended to simultaneously. Our view accordingly is that in all probability, P.W-2's evidence is true that there was no interview between D.W-5 and Janakiramayya and that no facts have been established to prove any positive misrepresentation by D.W-5. The burden of proving this lies upon the first respondent and in the absence of proof it cannot be held that the company is bound by anything which D.W-5 may have said. Though we cannot commend the practice of calling upon an insured person who knows only Telugu to answer questions couched in English, the duty of making himself acquainted with the contents of what he was signing, undoubtedly lay upon Janakiramayya himself on the facts of this case, and he must be held responsible for the statements that he had had no sickness, ailment or injury since December, 1935, and had not been attended upon or prescribed for by any physician. (See *Bigger v. Rock Life Assurance Co.*¹ and *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.*²)

We have said that the answers to the declarations in Ex.D-16 are on the face of them untrue, but it was argued by Mr. Govindarajachari that questions and answers must be reasonably interpreted, and that, judged by this test the answers are substantially true. Much stress was laid upon the comparatively innocuous nature of arsenic dermatitis. P.W-1 for instance says that it is not a disease in the strict sense of the term, and does not affect longevity. D.W-7 quotes a text book which gives the death-rate from dermatitis as one in 15,000 to 22,000 injected. D.W-6 says that Janakiramayya need not have stayed in the hospital at all, but was induced to enter it "for nursing care". It is common ground that by September, 1936 (and indeed so early as in March) the dermatitis was cured.

It was therefore argued on all these facts that Janakiramayya might legitimately regard this incident in his life as of trifling importance in which no insurance company would take any interest in deciding whether to reinstate a policy or not. Reliance is placed in this connection upon the decision in *The Connecticut Mutual Life Insurance Co. of Hartford v. Kate Douglas Moore*³. We do not think this case is of much assistance to first respondent. It is true that the expression "attendance by a doctor" is interpreted as excluding occasions when medical aid has been sought for some trifling ailment, occasions which are not likely to be present to the mind of a person filling up a proposal form, but it is noteworthy that whereas the term "serious illnesses" occurs in the judgment, the only non-serious complaints mentioned in it are a headache and a cut finger. It is impossible to consider a five week's course of treatment for arsenic derma-

1. (1903) 1 K.B. 516.

3. (1881) 6 A.C. 644.

2. (1929) 2 K.B. 356.

titis in hospital, as on the same level as such trivial complaints, however, free from danger the dermatitis may have been, and however complete its cure.

One further point must also be mentioned in this connection and that is that it cannot in our opinion be fairly said on the facts of this case that the disclosure of this illness by Janakiramayya would have had no influence on the company's decision to reinstate the policy. The dermatitis was caused by an injection of arsenic. The arsenic was injected because the hospital authorities had reason to believe that Janakiramayya might have been suffering from syphilis. There was no positive proof in this case that Janakiramayya did suffer from syphilis, and indeed there are indications to the contrary but the insurance company under the terms of its policy, and of Ex.D-16 was certainly entitled to be informed of facts which might have led it to suspect that syphilis was present. For the reasons which we have given we do not therefore think that the answer "none" to the two declarations was true on a reasonable interpretation of their terms. If it was not true and if, as we have found, it was not induced by any misrepresentation as to the meaning of the declarations, it must necessarily follow upon the terms and conditions of Ex.D-16 that the company can legally repudiate liability.

In the result this appeal must be allowed, and plaintiff's suit dismissed with the costs of the appellant throughout. The memorandum of cross objections must also be dismissed, but without costs, as in our opinion the learned Subordinate Judge gave no valid reason for refusing costs to the first respondent on his view of the facts and law.

K. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Sangili Velan

*Accused.**

Criminal trial—Committal—Legality—Conviction for theft—Subsequent committal to sessions on the ground of accused being an old offender is irregular.

Where an accused is charged with theft and a sub-magistrate tries him as in a warrant case and finds him guilty and convicts him, it is thereafter irregular to commit him to the sessions on the ground that he was an old offender. It is open to the sub-magistrate in such a case to send the papers to a first class magistrate for passing an enhanced sentence.

Case referred for the orders of the High Court, under section 215 of the Criminal Procedure Code, by the Sessions Judge of the Trichinopoly Division in his letter No. D. 4219, dated 18th July, 1943.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—This is a reference by the learned Sessions Judge of Trichinopoly with regard to the commitment of the accused in C.C. No. 526 of 1943 on the file of the Stationary Sub-Magistrate of Lalgudi. The accused in that case was charged with having committed theft. The Magistrate tried him as in a warrant case, found him guilty, convicted him of the offence of theft, and as he was an old offender he committed the accused to sessions. It is pointed out by the learned Sessions Judge that after having found him guilty, he ought not to have committed the accused to Sessions Court. It was open to him to send the papers to a First Class Magistrate for passing an enhanced sentence in view of the fact that the accused was an old offender. Instead of doing so he committed him to sessions. This is irregular, especially as the provisions relating to the enquiry into offences as laid down under Chapter XVIII of the Criminal Procedure Code had not been followed.

*(Case Referred No. 37 of 1943). Cr. R.C. 489 of 1943. 2nd September, 1943.

The conviction and sentence are therefore set aside and the case remanded to the file of the Stationary Sub-Magistrate of Lalgudi for being dealt with according to law.

V. S.

Case remanded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Chinnamma Naicken and others

.. Petitioners *

v.

Rama Naicken and others

.. Respondents.

Criminal Procedure Code (V of 1898), section 146—Order under—Validity—Matter covered by decision of Civil Court.

An order under section 146, Criminal Procedure Code, can be passed only in the absence of an order of a competent Court binding as between the parties to the proceedings. Where the question of possession between the parties is decided in a civil suit in which the parties and lessees claiming under them have been impleaded, the decision is *prima facie* valid and binding on them and there is no room in such a case for passing an order under section 146.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment and order of the Court of the Joint Magistrate of Karur in Miscellaneous Case No. 9 of 1943.

N. S. Mani for K. V. Sesha Aiyangar and N. Karpakavinayakam, for Petitioners.

V. T. Rangaswami Aiyangar for N. S. Raghavan for Respondents.

The Court made the following

ORDER.—This is a petition to revise the order of the Joint Magistrate of Karur passed under section 146 of the Code of Criminal Procedure. There was a dispute about possession between the A and B party who were parties to Miscellaneous Case No. 9 of 1943 on the file of the Joint Magistrate of Karur. Each side claimed to be in possession of the properties. The petitioners before this Court contended that they obtained delivery of possession of the properties in execution of a decree in O.S. No. 19 of 1942 on the file of the Subordinate Judge of Trichinopoly to which some of the members of the A party were parties, and that consequently the right to obtain delivery of possession of properties having been found by a competent Court, the Joint Magistrate was not justified in passing an order under section 146.

Exhibit I-A, the delivery attakshi, shows that 2 acres 74 cents in survey field No. 474, 53 cents in 475, 1 ac. 11 cents in 477, 4 ac. 1 cent in 478, the southern 14 cents in survey field No. 479, 1 ac. 81 cents in 468, southern 3 acres 10 cents out of the 8 acres 90 cents in 770-A, the western 5 acres 27 cents in survey field No. 774 and eastern half of 472 which is 0 acre 90 cents in extent were delivered over to the two plaintiffs in pursuance of a decree in ejectment, on the 18th February, 1943. It is urged before me that the decree in that suit is a decree which decided the rights as between the parties as regards the title to these properties and the right to obtain possession and that consequently in the face of that order of a competent Court there was no need for directing a receiver to be in possession of the properties till the question is decided by a competent Court. An order under section 146 is conceivable only in the absence of an order of a competent Court binding as between the parties to the proceedings. In this case two of the members of the A party were parties to the suit and the other persons who claimed as lessees claimed to be lessees under a lease-deed executed by them in 1942. The suit itself, though brought in 1942 was filed in 1941. Therefore the decree will be binding on the lessees who claimed a right under a lease of 1942, by reason

*Crl. R. C. No. 877 of 1943.

(Crl. R. P. No. 823 of 1943).

23rd February, 1944.

of section 52 of the Transfer of Property Act. The Joint Magistrate was not able to make up his mind as to whether there was a delivery by the amin or not. The delivery attakshi itself was filed; but the A party contended that some of the lessees raised an objection and therefore that there was no delivery of possession. But the amin's evidence was that when he went to the land on the 15th February, one of the plaintiffs was not present and therefore he had to wait till the 18th and delivered possession on that date and that there was no obstruction. Whatever it be, when there was an order by a competent Court in the decree in that suit which was binding on the parties namely the lessor and the lessees who derived title under a lease-deed executed subsequent to the filing of the suit there was already a decision of a competent Court binding on the parties which is valid *prima facie* till it is set aside and therefore there was no need to pass an order under section 146 of the Code of Criminal Procedure.

In these circumstances, so far as the items mentioned above are concerned, the order under section 146 of the Code is vacated and set aside and petitioners' claim to them will be declared.

B. V. V.

Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Manavala Naidu and others

Petitioners.*

Madras Gaming Act (III of 1930), section 8—Running a gaming house—Game of throwing darts—Side-betting by persons other than thrower—Liability of proprietors to conviction—Servant assisting thrower of darts—Whether punishable.

The prosecution case was that the accused were running a gaming house where a game of darts was played in the following manner. A board with a number of squares in colours was kept leaning against a wall. On a table near it was kept a board showing the same colours. If a person placed money on any one of those colours on the table he was given three darts. Thereafter if he threw the dart and struck the colour on which he had placed his money he was given twice the amount staked by him on that colour. Apart from the person who threw the dart others also could take part in the game by way of 'side-betting', that is, by placing their money on any colour other than that chosen by the person who threw the darts. And if the thrower threw the dart on any colour on which they had placed the money they were entitled to get double the amount staked, and the others lost their amounts. The defence case was that it was only a game of skill and that there was no side-betting. With regard to the thrower of the darts it was found by the lower Court that it was a game of skill but the accused 1 and 2 were convicted with regard to the side-betting by persons who did not take part in the throwing of the dart and who only wagered on the colours on which the thrower was likely to throw the dart.

Held, that there was no question of skill in respect of the side-betting and that accused 1 and 2 were liable to be convicted in respect of the same. It could not be said in such a case that there could be no loss or gain to the proprietors of the gaming house.

Held however, that a servant of the accused who was engaged only in handing over the darts to the thrower was not liable to be convicted as the game of throwing was a game of skill.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Trichinopoly in Criminal Appeal No. 11 of 1943, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Trichinopoly Town in C. C. No. 455 of 1942.

K. Umamaheswaram and Mohamed Hibbathulla for Petitioners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—Accused 1, 2 and 4 in C. C. No. 455 of 1942 on the file of the Stationary Sub-Magistrate of Trichinopoly seek to have the order of the Sub-Divisional Magistrate of Trichinopoly in C. A. No. 11 of 1943 confirming the

*Criminal Revision Case No. 606 of 1943.
(Criminal Revision Petition No. 558 of 1943).

conviction of these three accused for the offence punishable under section 8 of the Madras Gaming Act, and the sentence of Rs. 50 on accused 1 and 2, Rs. 20 on the 4th, reversed. They were tried along with another accused. The prosecution case was that accused 1 and 2 were running the gaming house and that accused 3 and 4 were their servants. The game was one of darts. This is how the game was said to have been played. A board with a number of squares in six colours is kept leaning against the wall. On a table near it is placed a board showing the same six colours. If a person places money on any of those colours on the table he will be given three darts. If he throws the darts and strikes the colour on which he has placed his money he will be given twice the amount staked by him on that colour. Apart from the person who throws the dart others also could take part in the game. That is what is described as side betting in the judgment of the lower Court. Persons other than those throwing the darts should place their money on any colour other than the colour chosen by the person who throws the darts. If the thrower throws the darts on any of the colours on which they have placed the money they will be entitled to get double the amount staked. The others will lose theirs.

The prosecution case is that on the 15th June, 1942, the Circle Inspector of Police, Law and Order, Trichinopoly, armed with a warrant issued by the District Superintendent of Police made a raid on 45, Chinna Bazar Road, Trichinopoly, where this game was said to be going on. He went there immediately after one play was finished and the second was about to start. One Ganapathi was the person who had staked the money on one colour and he was ready to throw the darts. A number of other persons had placed money on other colours in the board on the table. P. W. 1 saw Ganapathi throw the dart and the money kept by him there. He found a number of other persons standing there. He examined them and ascertained who all had kept the money on the other colours besides those on which Ganapathi had staked. He seized all the articles and he arrested these persons. The defence case was that it was only a game of skill and the accused were not guilty of having committed any offence under the Gaming Act. They also denied there was side betting.

The prosecution relied only on the evidence of P.W. 1, the Inspector. A number of witnesses were examined for the defence who stated that there was no side betting. Both the Courts have accepted the prosecution case that there was side betting and held that it amounted to gaming and that therefore the petitioners were guilty. With regard to the thrower of the darts it was found by the Appellate Court that it was a game of skill. The conviction of the petitioners was with regard to the side betting by persons who did not take part in the throwing of the dart and who only wagered on the colours on which the thrower was likely to throw the dart. The consciousness on the part of the accused that side betting was a crime and ought not to be allowed is clear from the fact that a number of witnesses stated that not only that there was no side betting but also that a board was put up that there should be no side betting. Several of the defence witnesses stated that when the person who throws the dart stakes his money others were not allowed to place their money on other colours. The Circle Inspector of Police definitely stated that he found money on all the other colours and that he examined the persons who were there. He also mentioned who it was that staked money on the other colours. I have therefore no doubt that both the Courts were justified in coming to the conclusion that side betting was going on. There was no question of skill involved in such betting.

It is next urged that this is not a case in which there is any likelihood of any gain or loss to accused 1 and 2. I am unable to understand how it could be said in a game like this there could be no loss or gain to the proprietors. If a person stakes his money on white and throws the dart and a number of other persons who side-bet, stake their money on other colours, it is only the person who has staked his money on the correct colour that will be getting double the amount staked.

The others will be losing their bet and that money will go to the proprietor. The decisions relied upon for the petitioners have therefore no application to the facts of this case. Accused 1 and 2 the proprietors running the show, were therefore guilty of the offence punishable under section 8.

So far as the fourth accused is concerned he was only a servant. He was engaged only in handing over the darts to the thrower and the game of throwing the darts is a game of skill, so far as the person throwing is concerned. When accused 4 was helping only that person it cannot be said that he committed any offence. I therefore set aside the conviction and sentence against the fourth accused but confirm the same against the first and second accused.

B. V. V.

Conviction affirmed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

•PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

P. C. Kandaswami Pillai

*Petitioner**

v.

The Municipal Commissioner, Palghat

Respondent.

Madras District Municipalities Act (V of 1920), sections 216, 317 and 347, proviso—Putting up buildings without licence—Prosecution under section 317—Time-limit—Remedy under section 216 whether operates as bar.

The complaint against the petitioner was that he made some additions to his buildings situate within Municipal limits without obtaining a licence. He applied for a licence on 20th April, 1942, and it was shown that the buildings were completed on 25th May, 1942. The prosecution was launched on 21st December, 1942. *Held*, that as the complaint was filed within twelve months from the date of the application of the petitioner the provisions of section 347 of the Madras District Municipalities Act were complied with.

Held further, that in such a case the fact that the Municipality had a remedy under section 216 for requiring the new building to be demolished could not disentitle them from taking proceedings under section 317 of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgments of the Court of the First Class Bench of Magistrates, Palghat, dated 25th February, 1943, and passed in S.C. No. 1583, etc., of 1942, respectively.

S. V. Venkatasubramaniam for Petitioner.

A. K. Balakrishnan for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—In all these three petitions the petitioner is the same and he has been prosecuted for having failed to obtain a licence for effecting some additions to three of his buildings and each of these revision petitions relates to one such building.

The points urged for the petitioner in all the three petitions are the same. The first point is that he was prosecuted long after the time fixed by the Act for launching a prosecution. The complaint against the petitioner was that he made additions to three of his buildings within the Municipal limits of Palghat without a licence. He applied for a licence on the 20th April, 1942, and Exhibit A is an endorsement on his application. In that application it is stated that he proposed to make certain constructions to certain buildings. They were completed according to Exhibits G and F on 25th May, 1942. The prosecution was launched on 21st December, 1942. Under the proviso to section 347 of the District Municipalities Act in case of prosecution for failure to take out a licence the failure should be considered to have taken place at the expiry of the period for which the licence is required and in other cases where no period is prescribed the complaint may be made at any time within twelve months from the commencement of the

*Criminal Revision Cases Nos. 331 to 333 of 1943.
(Criminal Revision Petitions Nos. 296 to 298 of 1943).

14th October, 1943.

offence. In this case the complaint was filed within twelve months from the date of the application of the petitioner and in the application he has stated that he was going to construct a building and prayed for a licence. There is this evidence to show that the offence was committed within twelve months prior to the date on which the complaint was filed.

It is next stated that the remedy of the Municipality was under section 216 and that he ought not to have been prosecuted under section 317. Under section 199 the construction or re-construction of a building shall not be begun unless and until the executive authority has granted permission for the execution of the work. Under section 317 if the construction or re-construction of any building is commenced without the permission of the executive authority the owner of the building shall be liable on conviction to a fine which may extend to five hundred rupees, etc. In this case the petitioner failed to comply with the requirements of section 199 and therefore was liable to be prosecuted under section 317. It is true under section 216 if a building is completed the municipality can ask him to demolish it. But this is only an additional remedy and the fact that the municipality has a remedy under section 216 cannot disentitle them in taking proceedings under section 317.

The petitions are accordingly dismissed.

B.V.V.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

P. Koyatti

*Petitioner.**

Laccadive Islands and Minicoy Regulation (I of 1912), section 10-C—Order of Inspecting Officer directing a person to execute a bond to be of good behaviour—Order based on opinions expressed by inhabitants to the Officer—Not open to revision by High Court.

In the case of the Laccadive islands and Minicoy, which during a major portion of the year are not accessible to the outside world, the Inspecting Officer has necessarily to act upon the opinions expressed by a large number of residents of that island with regard to the apprehension as to whether a person is likely to cause a breach of the peace in future or not. In the case of inquiries under section 10-C of the Laccadive Islands and Minicoy Regulation (I of 1912) the nature of the enquiry is left to the discretion of the Inspecting Officer and the Evidence Act is not in force in those islands.

The High Court will not interfere in revision with the order of the Inspecting Officer directing a person to execute a bond to be of good behaviour on the ground that he was likely to create a breach of the peace based on the opinion expressed by the inhabitants.

Maruthapali Goundar, In re, (1936) 45 L.W. 308, distinguished.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Collector of Malabar, dated 12th June, 1943, in proceedings D. Dis. 7914 of 1943 (Dis. 13—Minicoy 43—proceedings) of the Island Inspecting Officer, Malabar Islands, dated 23rd February, 1943.

K. N. Kumaran for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the order of the Collector of Malabar dismissing the appeal of the petitioner against the order of the Island Inspecting Officer of Malabar under section 10-C of the Laccadive Islands and Minicoy Regulation I of 1912, directing the petitioner to execute a bond for Rs. 200 to be of good behaviour for a period of one year from the date of the order.

The petitioner is a resident of Minicoy. An enquiry was made against him and three others on information received that they were likely to create a breach of the peace and cause disturbance in the island. Under section 10-C,

*Crl. R. C. No. 566 of 1943.
(Crl. R. P. No. 519 of 1943.)

"Whenever, after such inquiry as he thinks fit, the Inspecting Officer or the Collector or any of the Collector's assistants empowered under sub-section (1) of section 10-A is satisfied that any person in the islands—

(a) is a habitual offender, or

(b) is likely to commit a breach of the peace or disturb the public tranquillity, or

(c) is so desperate and dangerous as to render his being at large without security hazardous to the community, he may require such person to execute a bond with sureties, for keeping the peace or for his good behaviour for such period not exceeding three years as he thinks fit to fix."

In this case the Inspecting Officer went to the island and with the information already recorded by the Headquarters Magistrate of Malabar examined the Karnavans and Moopans and a number of other persons and was of opinion as a result of such enquiry that three of them including the petitioner were likely to commit acts involving a breach of the peace. It is stated for the petitioner that there is no finding that he has done any particular act from which it could be said that he is likely to do acts in the future involving a breach of the peace, and reliance was placed for this contention on the decision in *Maruthapali Goundar*, In re¹. But that is a decision under section 107 of the Code of Criminal Procedure. In the case of inquiries under section 10-C of Regulation I of 1912, the nature of the enquiry is left to the discretion of the Inspecting Officer, and it is admitted that the Evidence Act is not in force in those islands. It cannot hence be said that if the Inspecting Officer after hearing the important persons in the island came to the conclusion that the petitioner was likely to do acts involving a breach of the peace, this Court will be justified in interfering disagreeing with the opinion of the officer. It is observed in the first Court's order that Minicoy had been in a disturbed state for several years and that the Government Amin as well as the local people were against the petitioner and others. The Collector also on appeal observes that the Inspecting Officer was satisfied and quite rightly that the Island of Minicoy was in a disturbed state, and that the petitioner was one of those responsible for such a state of affairs'. I think in the case of such islands which during a major portion of the year is not accessible to the outside world, the officer has necessarily to act upon the opinion expressed by the large number of residents of that island with regard to the apprehension as to whether a person is likely to cause a breach of the peace in future or not.

I therefore do not think I will be justified sitting in revision in interfering with the order of the Collector. It cannot be said that there are no relevant materials on which the order has been arrived at. In the result the petition is dismissed.

K.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE HORWILL.

Matam Basayya

*Appellant.**

v.

Manumantha Reddi and another

Respondents.

Civil Procedure Code (V of 1908), section 60 (1) (c)—House occupied by agriculturist—Exemption from attachment not claimed prior to sale in execution—Bar of constructive res judicata applies—Scope and nature of the protection under section 60 (1) (c).

On the question whether the sale in execution of a house in the occupation of an agriculturist can be set aside even though the agriculturist failed to claim the protection under section 60 (1) (c), Civil Procedure Code, both at the time when the property was attached and when it was brought to sale?

Held, that if a person during the course of execution proceedings does not raise an objection to the sale of property which, if raised, would prevent the property from being brought to sale, he is debarred by the principle of constructive *res judicata* from raising the same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings. The question whether a particular house is a house in the occupation of an agriculturist is a question of fact and where there is nothing before the Court to show that the house sought to be sold is a house in the occupation of an agriculturist, it cannot be said that the Court acted without jurisdiction in selling that house.

Section 60 (1) (c) was no doubt enacted to protect agriculturists, but the protection can be waived by them. If they can waive it, it follows that there cannot be any absolute prohibition against the sale of an agriculturist's house and there is therefore no bar to the application of the principle of constructive *res judicata*. Moreover the fact that section 60 prohibits only the attachment of an agriculturist's house and does not prevent him from selling it if he so wishes, indicates that there is no public policy against the alienation of an agriculturist's house.

Appeal against the order of the District Court of Bellary, dated 17th August, 1943 and made in E. A. No. 139 of 1943 in E. P. No. 11 of 1943 in O. S. No. 31 of 1940.

Kasturi Seshagiri Rao for Appellant.

P. Chandra Reddi and *K. Venkataratnam* for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—The question in this appeal is whether the sale of the appellant's house in execution of a money-decree against him can be set aside on the ground that under section 60 (1) (c), Civil Procedure Code, a house in the occupation of an agriculturist is exempted from attachment. The lower Court held that in view of the conduct of the appellant in not claiming his rights on two prior applications, first at the time when the property was attached, and secondly when the property was brought to sale, he cannot raise the objection now after the property has been brought to sale.

There can be no doubt that if a person during the course of execution proceedings does not raise an objection to the sale of property which, if raised, would prevent the property from being brought to sale, he is debarred by the principle of constructive *res judicata* from raising that same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings. The learned advocate for the appellant, however, seeks to distinguish this case by contending that there is an absolute bar laid down in section 60 (1) (c), Civil Procedure Code, based on public policy which renders void the sale of any house occupied by an agriculturist. He has quoted *Aidal Singh v. Khazan Singh*¹ in support of his contention. That was a case in which the sons of an agriculturist in a subsequent suit contended that the sale of an ancestral house in which their father had been living and which had been brought to sale in execution of a decree against the father was absolutely void. The learned Judges held that as the sons had an independent cause of action they could bring a suit. They further held that in any event there was an absolute prohibition under section 60 (1) (c) against the sale of an agriculturist's house and that the sale therefore was void. The same questions, however, arose in a subsequent case before a Full Bench of the same High Court in *Thakur Din v. Sitaram*² and the learned Judges on both points disagreed with the learned Judges in *Aidal Singh v. Khazan Singh*¹. They held that when the house was sold, the father represented not only himself but also his sons; and also that as the father had not raised the objection at the first opportunity, he and his sons were debarred by the principle of constructive *res judicata*, from raising the point in subsequent proceedings.

It is said that there is no direct decision on this question in this High Court; but a very similar question arose in *Somasundaram v. Kondayya*³, in which was raised an objection to the sale of an inalienable inam that was not raised during

1. (1930) A.L.J. 1244.

2. I.L.R. (1939) All. 602 (F.B.).

3. (1925) 49 M.L.J. 401.

the execution proceedings, with the result that the inam was sold. One of the learned Judges, Venkatasubba Rao, J., said:

"It was next contended that the sale of an unenfranchised inam is absolutely void and the plaintiff's suit should on that ground be dismissed. I cannot follow this contention. As I have said, we are not here concerned with the true facts of the case but only with the result of certain proceedings. Is the defendant to be permitted to plead that the land was inalienable at the time of the Court sale? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold."

We consider this principle to be applicable to the case now under consideration. If it was obvious to the executing Court that the decree-holder was seeking to bring to sale a house in the occupation of an agriculturist, there might be a ground for argument that the Court acted without jurisdiction in selling it; but the question whether a particular house is a house in the occupation of an agriculturist is a question of fact. If there is nothing before the Court to show that the house sought to be sold is a house in the occupation of an agriculturist, it cannot be said that the Court acted without jurisdiction in selling that house. The learned advocate for the appellant refers to *Ramakrishnamma v. Venkatasubbiah*¹, in which, he says, a different view of this question was taken. The learned Judges were there primarily concerned with the question whether a dasabandham service inam was absolutely inalienable; but at the end of their judgment they said:

"We must hold that lands burdened with a dasabandham service, which is a service of a public nature, are inalienable as being against public policy and, being inalienable cannot be sold in execution of a decree against an inamdar. The lower appellate Court also found that estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy. No argument to the contrary was addressed to us by the appellant upon this point and that question therefore does not arise in this appeal."

The question whether the failure of the judgment-debtor to raise an objection before the sale would operate as *res judicata* against him if the same point were raised after the sale, did not come up for consideration. Even if, however, it be considered that *Ramakrishnamma v. Venkatasubbiah*¹ is an authority for the position that the sale of a dasabandham inam is absolutely void, a dasabandham inam can be distinguished from an agriculturist's house because, as the learned Judges point out in that case, it is a matter of public policy not to permit the sale of an inalienable inam, for the result would be that the service would become severed from the land, but we cannot find the same public policy behind the enactment in section 60 (1) (c), Civil Procedure Code. That section was undoubtedly enacted in order to protect agriculturists, in order that they might pursue their avocation despite the fact that there were decrees against them; but the protection can be waived by the agriculturists. The learned District Judge has quoted cases in his judgment in which it was laid down that an agriculturist can waive his right under section 60, Civil Procedure Code; and it is not denied by the learned advocate for the appellant that he can do so. If an agriculturist can waive his right under section 60, then it seems to us to logically follow that there cannot be any absolute prohibition against the sale of an agriculturist's house and that there is therefore no bar to the application of the principle of constructive *res judicata*. Moreover, the fact that section 60, Civil Procedure Code prohibits only the attachment of an agriculturist's house and does not prevent an agriculturist from selling his house privately if he so wishes, is an indication that there is no public policy against the alienation of an agriculturist's house.

The appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Chinnapan Rowther *alias* Sahul Hamid

*Petitioner**

Defence of India Act and Rules (1939), section 2 (5) and rule 81 (2)—Order by Provincial Government prohibiting the export of paddy or rice from Madras Province except under certain conditions—Subsequent delegation of its powers to District Magistrates—Notification by District Magistrate prohibiting the export of paddy or rice outside the district limits—Violation of notification by the accused—Whether prosecution is legal.

On 13th June, 1942, the Governor of Madras in exercise of the powers conferred by rule 81 (2) of the Defence of India Rules, prohibited the export of paddy or rice outside the province of Madras except under certain conditions. On 27th July, 1942, the Provincial Government delegated its powers conferred by rule 81 and certain other rules to all Additional District and Sub-Divisional Magistrates within their respective jurisdictions. In pursuance of this delegation the District Magistrate of Madura notified the prohibition as to the export of paddy or rice outside the district limits except under a permit. This notification was violated by the accused. On the question whether the petitioner (accused) could not be charged under the notification issued by the Additional District Magistrate, but only under the notification issued by the Provincial Government because he was engaged in transporting rice out of the province into an Indian State and not from one district within the province to another,

Held, that the notification of the Additional District Magistrate is *intra vires* his powers and the conviction of the petitioner was proper.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Madura division in C.A. No. 185 of 1943 preferred against the judgment of the Court of the Additional First Class Magistrate of Dindigul in C.C. No. 238 of 1943.

K. S. Jayarama Ayyar and S. K. Ahmed Meezan for Petitioner.

The Advocate-General, (Sir A. Krishnaswami Ayyar) and the Assistant Public Prosecutor (N. Somasundaram) for the Crown.

The Order of the Court was delivered by

The Chief Justice.—The petitioner was charged in the Court of the Additional First Class Magistrate of Dindigul with having attempted to smuggle rice from the District of Madura to the State of Travancore in violation of a notification issued by the Additional District Magistrate of Madura, dated 18th February, 1943, prohibiting the export of rice to places outside the Madura district. The Magistrate found the charge to have been proved and sentenced the petitioner to undergo rigorous imprisonment for a period of six months. An appeal to the Sessions Judge was dismissed. The accused has now applied to this Court to revise the order of the Sessions Judge. He does not challenge the findings of fact. He confines his case to the contention that the notification issued by the Additional District Magistrate prohibiting the export of rice from the Madura District did not apply in the circumstances. He maintains that he could only have been charged under an earlier notification issued by the Provincial Government, and as this had not been done the prosecution was illegal.

Rule 81 (2) of the Defence of India Rules empowers the Provincial Government so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the War or for maintaining supplies and services essential to the life of the community by order to provide *inter alia* for regulating or prohibiting the transport of articles or things kept for sale. Section 2 (5) of the Defence of India Act states that a Provincial Government may by order direct that a power or duty which by rule made under sub-section (1) is conferred or imposed on the Provincial Government shall, in such circumstances and under such conditions as may be specified, be exercised

or discharged by an officer or authority, not being an officer or authority subordinate to the Central Government. Rule 81 (4) says that if a person contravenes an order made under the rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or both. Rule 121 provides that a person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, the contravention of any of the provisions or the rules or of any order made thereunder, shall be deemed to have contravened that provision, or, as the case may be, that order.

By an order dated the 13th June, 1942, the Governor of Madras in exercise of the powers conferred by sub-rule (2) of rule 81 of the Defence of India Rules passed an order prohibiting a person on or after the 1st July, 1942, from transporting paddy or rice from the Province of Madras to any place outside the Province except under and in accordance with the terms and conditions of a permit issued by the Special Officer for prices, Madras, or any other officer specially authorised by the Special Officer in this behalf. An exception was made in the case of a person transporting paddy or rice not exceeding three maunds in weight for private consumption.

On the 27th July, 1942, the Provincial Government delegated its powers conferred by rule 81 and certain other rules to all Additional District Magistrates and Sub-Divisional Magistrates within their respective jurisdictions. In pursuance of this delegation the Additional District Magistrate of Madura on the 18th February, 1943, notified the following order made by him:

"No persons shall export any amount of paddy or rice, however small, from any place in Madura district to places outside its limits except under a permit issued by the Collector of Madura, or by an officer authorised by him."

The case for the petitioner is that he could not be charged under the notification issued by the Additional District Magistrate of the 18th February, 1943, but only under the notification issued by the Provincial Government on the 13th June, 1942, because he was engaged in transporting rice out of the province into an Indian State, not from one district of the Madras Presidency to another. We are unable to accept this argument. It has not been suggested that rule 81 of the Defence of India Rules is in any way *ultra vires*, nor is it suggested that the legislative authority had no power to insert sub-section (5) of section 2 in the Act. It has in fact been accepted that the Provincial Government has all the powers conferred by rule 81 and that it has the power of delegation. It has in this case delegated to the Additional District Magistrate its power of controlling the transport of paddy and rice to places outside the district. The Additional District Magistrate has passed an order prohibiting the export of paddy or rice from the Madura district without a permit issued by the proper authority. The validity of this order is not, or cannot be, called in question. A person offends against it if he removes or takes any steps towards the removal of paddy or rice from the district without a permit. The petitioner offended against this order. He was caught in an attempt to transport rice from a place in the district to a place outside the district. It matters not whether he intended to take it to the State of Travancore or to either of the adjoining districts of Tinnevely or Ramnad. It was not necessary to mention the State of Travancore in the charge; and the fact that it was mentioned does not in any way change the position. The Additional District Magistrate of Madura was lawfully authorised to prohibit the transport of rice or paddy from that district without a permit and the petitioner contravened that order. The question whether the Provincial Government could in this case have itself taken action under its own notification does not arise and therefore does not call for discussion.

As we hold that the notification of the Additional District Magistrate of the 18th February is *intra vires* of his powers, the petitioner has been rightly convicted. Consequently his petition will be dismissed.

V. P. S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI Aiyar.

Y. S. David

.. Appellant*

v.

Bangaru Rangaraju and another

.. Respondents.

Transfer of Property Act (IV of 1882), sections 2 (d) and 36—Receiver appointed during pendency of mortgage suit—Sale in favour of auction-purchaser—Rent payable after date of sale—Whether auction-purchaser or receiver entitled to receive the rent.

During the pendency of a mortgage suit a receiver was appointed who leased the mortgaged properties and the lessee was in possession. Under the terms of the lease the rent was payable on 31st December, 1941. The auction-purchaser in execution of the decree in the suit bought the properties on 18th December, 1941, and claimed the entire rent as it was payable on a date subsequent to his purchase.

Held, that though according to section 2 (d) of the Transfer of Property Act, that Act did not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience could be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.

Appeal against and petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Narasapur, dated 20th November, 1942, and made in E.A. No. 655 of 1942 in O.S. No. 71 of 1937.

P. Somasundaram for Appellant.

G. Chandrasekhara Sastri for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in the appeal and the petitioner in the revision petition is the auction-purchaser of certain properties purchased by him in execution of the decree in O.S. No. 71 of 1937 on the file of the Subordinate Judge's Court of Narasapur. That was a suit for the recovery of money due on a mortgage. During the pendency of the suit a receiver had been appointed. That receiver had leased the properties and the lessee was in possession. The sale in favour of the appellant-petitioner was on 18th December, 1941. Under the terms of the lease granted by the receiver rent was payable on 31st December, 1941. The auction-purchaser claimed a right to receive the entire rent as it was payable on a date subsequent to his purchase. But the decree-holder contended that he was entitled to the entire amount due under the lease as rent was payable to the receiver appointed in the suit and that right cannot be said to have passed to the auction-purchaser. The learned Subordinate Judge who had to decide the question found that the rent has to be apportioned as between the auction-purchaser and the receiver representing the estate and ordered accordingly; and this appeal and the revision petition have been filed against that order.

The matter is concluded by the decision of three Judges of this Court in *Rangiah Chetty v. Vajravelu Mudaliar*¹. It was pointed out in that case that though according to section 2 (d) of the Transfer of Property Act that Act did not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience could be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease. It is true that there is a decision of this Court to the contrary in *Subbaraju v. Seetharamaraju*². I am bound to follow the later decision of the Full Bench.

It is represented by the learned counsel for the petitioner that there are observations of the Privy Council in *Phirozshaw Bomanjee v. Bai Goolbar*³,

*A.A.O. No. 228 of 1943 and C.R.P. No. 524 of 1943. 18th April, 1944.

1. (1917) 33 M.L.J. 618 : I.L.R. 41 3. (1923) 47 M.L.J. 79 : 50 I.A. 276; Mad. 370 (F.B.). I.L.R. 47 Bom. 790 (P.C.).

2. (1914) I.L.R. 39 Mad. 283.

which would throw some doubt on the correctness of the decision in *Rangiah Chetty v. Vajravelu Mudaliar*¹. There is no reference to that decision in the ruling of the Privy Council and though they raised the question as to whether the Indian rule or the English Common Law rule should be applied in a case of apportionment, they did not decide this point. The following was their Lordships' observation at page 795:—

"But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of proprietary and contractual rights, it was always open to a testator or settlor, with full power of disposition, to exclude its practical consequences".

Their Lordships had to construe a will and they decided the dispute on what was found to be the intention of the testator. I therefore do not think that the observations in that case could be said to overrule the decision in *Rangiah Chetty v. Vajravelu Mudaliar*¹. Following that decision I find that the learned Subordinate Judge was justified in apportioning the rent in the manner in which he has done.

The appeal and the revision petition fail and are dismissed with costs in the appeal only.

V. P. S.

Appeal and Petition dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE SHAHABUDDIN.

S. A. R. M. A. Vandarguzhal Achi and others

*Appellants**

v.

The South India Corporation. (Madras), Ltd. and others *Respondents.*

Provincial Insolvency Act (V of 1920), sections 4, 5 and 56—Power of Insolvency Court to give possession to the purchaser of property in insolvency proceedings—Adjudication by Rangoon High Court—Provincial Insolvency Act (V of 1920), section 77 and Presidency Towns Insolvency Act (III of 1909), section 126—District Court in Madras presidency beginning to act in aid of administration before separation of Burma in 1937—Power to deal with an application made after the separation, for possession by a purchaser in insolvency proceedings.

On the 1st April, 1933, the adult members of a joint family of Nattukottai Chettiers who were carrying on a money lending business in Burma were adjudicated insolvents by the Rangoon High Court. On the 31st August, 1933, acting under the provisions of section 126 of the Presidency Towns Insolvency Act and section 77 of the Provincial Insolvency Act that Court sent a letter to the District Court of Ramnad requesting it to direct the Official Receiver of that place to render aid to the Official Assignee of Rangoon. The District Judge directed the Official Receiver accordingly. The Official Receiver acting under this order took possession of a house at Kanadukathan belonging to the family. On the 19th September, 1933, the Official Assignee of Rangoon let the house on a monthly tenancy to the insolvents' wives who lived in the house with their minor sons. On the 16th December, 1938, the Official Assignee of Rangoon sold the house to X. When X attempted to take possession the tenants obstructed, alleging that the sale was not binding on the minors. X then made an application under sections 4, 5 and 56 of the Provincial Insolvency Act on the 5th November, 1941, to the District Court of Ramnad for an order requiring the wives and sons of the insolvent, to deliver up possession of the property.

Held: (1) The application was only one step in the administration of the insolvents' estate which the Rangoon High Court had ordered before the separation of Burma on the 1st April, 1937, and the District Court of Ramnad which had begun to act in aid of the administration of the estate before the separation of Burma had power to continue the same after the separation and had accordingly power to deal with the application of the purchaser though it was filed after Burma had been separated from India.

Venugopala Reddiar v. Krishnaswamy Reddiar, (1943) 2 M.L.J. 57 (F.C.) applied.

(ii) Sections 4, 5 and 56 of the Provincial Insolvency Act are very widely worded and empower the Insolvency Court to give possession to the purchaser of property sold in insolvency proceedings.

1. (1917) 33 M.L.J. 618 : I.L.R. 41 Mad. 370 (F.B.).

*A.A.O. No. 451 of 1942.

13th March, 1944.

Ramaswamy Chettiar v. Ramaswamy Aiyangar, (1921) 42 M.L.J. 185 : I.L.R. 45 Mad. 434 and *Singaravelu Mudaliar v. Swaminatha Pillai*, (1933) M.W.N. 1487 approved.

Venkatram v. Chokkier, (1927) 55 M.L.J. 163 : I.L.R. 51 Mad. 567 overruled.

Appeal against the order of the District Court of Ramnad at Madura dated 28th March, 1942 and made in I.A. No. 191 of 1941 in I.C. No. 86 of 1933 on the file of the High Court of Judicature at Rangoon.

B. Sitarama Rao and G. N. Chari for Appellants.

The Advocate-General (*Sir Alladi Krishnaswami Ayyar*), *K. Umamaheswaram* and *A. Kuppaswami* for Respondents.

* * * * *

The Judgment of the Court was delivered by

The Chief Justice.—The first appellant is the wife of one Annamalai Chettiar. The second, third and the fourth appellants are their sons. Annamalai was joint with his brothers Muthia *alias* Ramasami and Chandramouli. They are Nattukottai Chettiar and as a joint family carried on a money lending business in Burma. On the 1st April, 1933 the adult members of the family were adjudicated insolvents by the Rangoon High Court. On the 31st August, 1933 that Court, acting under the provisions of section 126 of the Presidency Towns Insolvency Act and section 77 of the Provincial Insolvency Act sent a letter to the District Court of Ramnad requesting it to direct the Official Receiver of that place to render aid to the Official Assignee of Rangoon. Burma was then a part of British India and remained a part of British India until the 1st April, 1937 when the Government of India Act, 1935, came into force. On receipt of the letter of request the District Judge directed the Official Receiver to render assistance to the Official Assignee of Rangoon as required by section 77 of the Provincial Insolvency Act. Acting under this order the Official Receiver took possession of the property which is the subject-matter of this appeal. The property consisted of a house at Kanadukathan. Admittedly it belonged to the family. On the 16th December, 1938 the Official Assignee of Rangoon sold the house to the first respondent for the sum of Rs. 42,500. The sale was free of a mortgage which had been created by the insolvents before their adjudication. On the 19th September, 1933 the Official Assignee had let the house to the wives of the insolvents on a monthly tenancy, subject to an undertaking given by them to deliver up the property whenever called upon to do so. The wives of two of the insolvents had issue and the children also lived in this house. Annamalai had four sons, three of whom were minors and Chandramouli one son, who was also a minor.

On the 5th November, 1941 the first respondent as the purchaser applied to the District Court of Ramnad for an order requiring the wives, the four sons of Annamalai and the son of Chandramouli, to deliver up possession of the property. When the purchaser came to take possession the tenants obstructed him and alleged that the sale was not binding on the minors. The application for an order for possession was made under sections 4, 5 and 56 of the Provincial Insolvency Act. Relying on the decision of this Court in *Ramaswami Chettiar v. Ramaswami Ayyangar*¹, the District Judge held that the Court had power to make the order. He rejected a suggestion that the application did not lie by reason of the separation of Burma from British India. The question whether the sale was binding on the minors was left to be decided in separate proceedings should this claim be persisted in. Consequently the District Judge ordered the respondents to the application to deliver possession to the purchaser. The appeal is from that order. In the first instance the appeal came before Mockett and Bell, JJ., who referred it to a Full Bench as *Ramaswami Chettiar*

• 1. (1921) 42 M.L.J. 185 : I.L.R. 45 Mad. 434. •

*v. Ramaswami Ayyangar*¹ was decided by a Division Bench and is in conflict with *Venkatram v. Chokkier*², which was also decided by a Division Bench.

As the Presidency Towns Insolvency Act was in force in Rangoon when the order of adjudication was passed, the insolvents' power to sell their sons' interests for the satisfaction of their debts devolved on the Official Assignee—*Sat Narain v. Beharilal*³ and *Sat Narain v. Sri Kishandas*; *Same v. Bank of Upper India*⁴. Therefore the Official Assignee had the power of conveying a full title to the purchaser of the property, subject to any contention on behalf of the minors that the debts of the fathers had been contracted for immoral or illegal purposes, which has never been suggested. The Official Assignee of Rangoon conveyed to the first respondent "all estate, right, title, interest, claim and demand of the said S.A.R.M. Chettiar firm and the mortgagees". The family traded under the vilasam of S.A.R.M. The Official Assignee was not quite accurate in describing the property as the property of the firm. It was family property, but this error is not of importance because the Official Assignee must be deemed in law to have conveyed to the purchaser his full interest in the property and his interest was that of the fathers and the sons.

We will turn now to the question whether the District Court had power to order the delivery of the possession of the property to the respondent. Section 77 of the Provincial Insolvency Act states that all Courts having jurisdiction in insolvency and the officers of these Courts shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another Court shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of the Courts could exercise in regard to similar matters within their respective jurisdictions. The corresponding section in the Presidency Towns Insolvency Act is section 126. As a letter of request had been sent by the Rangoon High Court to the District Court of Ramnad, that Court was able to take all steps which were necessary for the administration of the estate there. Sub-section (1) of section 4 of the Provincial Insolvency Act gives the Court, subject to the provisions of the Act, full power to decide all questions whether of title or priority, or of any nature whatsoever; and whether involving matters of law or of fact, which may arise in a case of insolvency coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in a case of insolvency. Section 5 gives the Insolvency Court the same powers as it has in the exercise of original civil jurisdiction and directs that it shall follow the same procedure. Sub-section (1) of section 56 states that the Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and the property shall thereupon vest in the receiver. Sub-section (3) says that where the Court appoints a receiver, it may remove a person from the possession or custody of property belonging to the insolvent, provided that the insolvent himself has a present right to do so.

In *Ramaswami Chettiar v. Ramaswami Ayyangar*¹, Ayling and Venkata-subba Rao, JJ., held that sections 4, 5 and 56 of the Provincial Insolvency Act conferred power on the Court to inquire into the title and order the delivery of an insolvent's property to a purchaser from the Official Receiver and remove the obstruction of a third party. This decision was followed by another Bench of this Court (Beasley, C.J. and Bardswell, J.) in *Singaravelu Mudaliar v. Swaminatha Pillai*⁵. In *Venkatram v. Chokkier*², Ramesam and Jackson, JJ.,

1. (1921) 42 M.L.J. 185 : I.L.R. 45 Mad. 434.

2. (1927) 55 M.L.J. 163 : I.L.R. 51 Mad. 567.

3. (1924) 47 M.L.J. 857 : L.R. 52 I.A.

22 : I.L.R. 6 Lah. 1 (P.C.).

4. (1936) 71 M.L.J. 812 : L.R. 63 I.A.

384 : I.L.R. 17 Lah. 644 (P.C.).

5. (1933) M.W.N. 1487.

held that while an Official Receiver on the insolvency of a Hindu father could sell the family property including his son's share, the Insolvency Court could not give possession of the son's share to the purchaser under section 4 of the Provincial Insolvency Act. The purchaser must, they considered, be relegated to a regular suit. The remarks made in the course of the judgment in this case are not consistent. In one place the learned Judges said,

"Once the Official Receiver has sold the property to a stranger and converted the insolvent's estate into money his business is to distribute this money among the creditors and it cannot be said that delivery of possession is a necessary part in the work of distributing the assets of the insolvent among the creditors".

Later they said that in such a case as the one before them they did not see why the purchaser should not be given joint possession of the insolvent's share, whatever doubts there might be as to the son's share.

We consider that the opinion to be preferred is that expressed in *Ramaswami Chettiar v. Ramaswami Ayyangar*¹ and in *Singaravelu Mudaliar v. Swaminatha Pillai*², which was decided later than *Venkatram v. Chokkier*³, Jackson, J., who was a party to the decision in *Venkatram v. Chokkier*³ granted the leave under clause (15) of the Letters Patent which allowed the appeal in *Singaravelu Mudaliar v. Swaminatha Pillai*² to be filed. In his judgment, Beasley, C.J., indicated that Jackson, J., had granted leave because he had come to the conclusion that *Ramaswami Chettiar v. Ramaswami Ayyangar*¹ was correctly decided. Sections 4, 5 and 56 of the Provincial Insolvency Act are very widely worded and without hesitation we hold that they empower the Court to give possession to the purchaser of a property sold in insolvency proceedings at the instance of an Official Receiver.

The question whether the District Court had power to entertain a purchaser's application, notwithstanding the separation of Burma from India has been decided by the judgment of the Federal Court in *Venugopala Reddier v. Krishnaswami Reddier*⁴, which was an appeal from this Court. The judgment of this Court (Mockett and Kunhiraman, JJ.) is reported as *Krishnaswami v. Venugopala*⁵. In 1932 a suit was filed in the Court of the Subordinate Judge of Trichinopoly for the possession of movable and immovable properties which to a large extent were situated in Burma. The question was whether the Subordinate Judge had power to continue the hearing of the suit after the separation of Burma from India on the 1st April, 1937. This Court held that he had and the decision was upheld by the Federal Court. Mr. Sitarama Rao on behalf of the appellant has argued that this decision does not apply because the application which has given rise to the present appeal was filed after Burma had been separated from India. We are unable to accept the contention. The application was only one step in the administration of the insolvent's estate which the Rangoon High Court had ordered before the separation. While Burma was a province of India, the Rangoon High Court had requested the District Court of Ramnad to aid it in the administration of this estate and the District Court had agreed to do so. We consider that the judgment in *Venugopala Reddier v. Krishnaswami Reddier*⁴ is directly in point.

For these reasons the appeal fails and must be dismissed with costs of the first respondent.

The learned counsel for the appellants asks for a certificate under section 205 of the Government of India Act, 1935. The appellants are entitled to a certificate and one will issue.

K. S.

• Appeal dismissed.

1. (1921) 42 M.L.J. 185 : I.L.R. 45 Mad. 567.
Mad. 434.

2. (1933) M.W.N. 1487.

3. (1927) 55 M.L.J. 163 : I.L.R. 51

4. (1943) 2 M.L.J. 57 (F.C.).

5. (1942) 1 M.L.J. 137 : I.L.R. (1942)

Mad. 376.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

A. K. Sherfuddin

.. Appellant*

v.

Kairoon Bi and others

.. Respondents.

Grant—Construction—Grant if personal, or to endowment—Inam register—Entries—Inference from—Question of law—Second appeal.

In the case of an inam grant in the name of the manager of a Mahomedan Durga, in the Inam Register the property was described as "Devadayam", and in the column "description of inam" the entry was "for the support of the J mosque". In the remarks column the following observations were made: "The inam is enjoyed in six shares by the six managers, who are the lineal descendants of the grantee.... To be confirmed in one title deed so long as the mosque exists", the confirmation was "for J mosque (manager)". It was found that after meeting the expenses of the durga the grantees were enjoying the balance of the income. The earlier revenue registers filed in the case also showed that the grant was to the manager.

Held, on a construction of the registers that the grant was to the person of the grantee and not to the endowment of which he was the manager.

Held, further, that the question as to the inference to be drawn from the several registers filed in the case was not one of fact but one of law for purposes of second appeal.

Appeal under clause (15) of the Letters Patent against the judgment and decree of King, J., dated 21st July, 1943, and passed in S.A. No. 971 of 1942 preferred to the High Court against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. No. 45 of 1941 (O.S. No. 213 of 1937 District Munsif's Court, Trichinopoly).

K. S. Sankara Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In the year 1674 a Rani of the Nayakhan dynasty made a grant of land to a Mohammadan named Dharves Ali Sha. The documentary evidence in this case leaves no doubt that the grantee was a member of a sect of Faqirs who were followers of Jalal-ud-din Bukhari. When Dharves Ali Sha died he was buried on the property. He has since been regarded as a saint and his tomb as a *durga*. After the tomb had been recognised as a *durga* a mosque was built by the side of it. When the mosque was erected is not known, but it is clear from the Inam register of 1864 that there was then a mosque in existence. The main question which arises in this appeal is whether the grant to Dharves Ali Sha was a grant to him personally or for the endowment of a mosque. We shall in due course examine in detail the evidence relating to this question; but before doing so we think it necessary to refer to two previous suits and to the course which the present litigation has taken.

In O.S. No. 96 of 1930 of the Court of the Subordinate Judge of Trichinopoly three Mohammadans and two Hindus brought a suit under section 92, Civil Procedure Code, for the recovery of the property now in suit and for the framing of a scheme for its management. There were six defendants and it is common ground that they were all descendants of the family of the grantee. They were in fact described as trustees "of the Jalali Fakir Durga and mosque". The word "Jalali" also appears in the Inam register and this gives the indication that Dharves Ali Sha was a member of the sect of Fakirs to which reference has been made. The defendants had no objection to a scheme being framed, but they wanted to be appointed trustees and to be declared to be entitled to the balance of the income of the properties after meeting the expenses of the *durga*. The

insistence that the properties of which they were in possession were the endowment of the *durga* as distinct from the mosque is not without significance. The fact that two of the plaintiffs were Hindus is another indication of the importance attached to the *durga*. In the course of the preliminary judgment the Subordinate Judge expressly held that the mosque was only a subsidiary institution attached to the *durga* and intended for the purpose of worship by those Mussalmans who resorted to the *durga*. A scheme was eventually framed by consent. It has been suggested in the present litigation that the decree in O.S. No. 96 of 1930 prevents any claim being made by a descendant of the grantee, even though he were not a party to the suit. This contention cannot, however, be accepted. So far as the properties are concerned, the only members of the grantee's family who are bound by what transpired in O.S. No. 96 of 1930 are the defendants to that suit.

In O.S. No. 135 of 1933 of the Court of the District Munsif of Trichinopoly the trustees who had been appointed by the Court in O.S. No. 96 of 1930 brought a suit to recover certain properties which they claimed to be part of the endowment of the *durga*. These were then in the hands of alienees. They were quite distinct from the properties now in suit, but the question whether the original grant was personal to Dharvesh Ali Sha or to him for the endowment of a mosque arose. It was held that the grant was personal. That decision however, only affects the properties which formed its subject-matter and also only binds the parties to the suit.

On the 12th October, 1936 one Mohamed Ibrahim Sahib, a descendant of the grantee, instituted the suit which has given rise to the appeal. He died during its pendency but it was continued by his legal representatives. The plaintiff advanced the plea that the properties which were held by the trustees appointed in O.S. No. 96 of 1930 belonged to the descendants of Dharvesh Ali Sha and did not constitute an endowment of the *durga* or the mosque. He claimed a one-eighteenth share and it is accepted that if his case is well founded his heirs will be entitled to this share. The defendants to the suit were the trustees appointed in O.S. No. 96 of 1930 and the other members of the family. The District Munsif held that the properties in suit constituted an endowment of the mosque. The plaintiff's legal representatives appealed to the Subordinate Judge, who held that the grant was personal to Dharvesh Ali Sha and as the plaintiff was not bound by the decree in O.S. No. 96 of 1930 he was entitled to a one-eighteenth share in the property. The executive trustee appointed under the scheme appealed to this Court. The appeal was heard by King, J., who held that the finding of the Subordinate Judge that the original grant was a personal one was a finding of fact and could not be challenged in second appeal. The learned Judge agreed with the Subordinate Judge that the decree in O.S. No. 96 of 1930 did not operate as *res judicata*, as the appellant had contended. The present appeal is from the judgment of King, J., under clause (15) of the Letters Patent. The appellant is the executive trustee.

The first question which the Court is called upon to decide is whether King, J., was right in holding that the decision of the Subordinate Judge that the original grant was personal to Dharvesh Ali Sha could not be challenged as it constituted a finding of fact. We find ourselves unable to share the opinion of the learned Judge. In order to decide the question of title it is necessary for the Court to interpret entries in (I) Wallace's Register which was compiled in 1802, (II) Traverse's Register which was compiled in 1814 and (III) the Inam Register which was compiled in 1864. In *Dhanna Mal v. Moti Sagar*¹, the Privy Council pointed out that the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference to be drawn from facts and not itself

¹. (1927) 52 M.L.J. 663; L.R. 54 I.A. 178; I.L.R. 8 Lah. 573 (P.C.).

a question of fact. In *Ballabh Das, v. Nur Mohamed*¹, their Lordships held that the inference to be drawn from a revenue survey *Khasra* and a map constituted a question of law. The position is very much the same here. As the Court has to decide what are the inferences to be drawn from the entries in the registers referred to, we have no doubt that the question is one of law.

It is now necessary to decide whether the Subordinate Judge was right in holding that the grant was personal to Dharvesh Ali Sha. Wallace's Register shows that the claimant to the property was a grandson of the original grantee and the grant was registered as an *inam*, though the purpose is not specified. The entries only refer to a part of the property in suit, but it has not been suggested that any other portion was held on different terms. This register gives the year of the grant as 1739 and the grantor as Nababkanza Abdulla Cawn. It is common ground that this means that the original grant was confirmed by the Mohammadan ruler who succeeded the last Nayak ruler. The entries in Traverse's Register are very similar, but the following interesting statement is made in the "Remarks" column:

"On enquiry, it appears that 250 goolies of punjee and 50 goolies of nanjee land in the village of Ammapettah and 1½ chays of land in the village of Tenoor as also one chay of garden land in the garden of the Royal demesne was granted in the year Racha of Salivahana 1606 by Meenachammal to a Fakir named Durvaish Ally. The present incumbents who state themselves to be the Fakhir's grandsons produce a copper Sasnamam to this effect. They also delivered the purvanah inserted in this register of Coya Abdulla Khan to Mr. Wallace and have beside several other documents, which they now bring forward; these do not make the grant hereditary; but they further produce an Enayetnamah by Mohammed Ally to Kissemmulmoolk, making the grant hereditary in the family of Durvaish Ally; this document is dated 4th of Rabulaval Hejeeera, 1207. The *inam* is very suspicious as this last voucher may be a forgery."

Salivahana 1606 corresponds to the year 1674. Traverse's Register covers the whole of the property comprised in the original grant.

Two extracts from the Inam Register have been exhibited. One is dated the 9th March, 1864, and the other, the 12th March, 1864. In the column headed "General class to which the *inam* belongs" is inserted the word *Devadayam* which is defined in Wilson's Glossary as "lands or allowances for the support of a temple, an endowment." It is accepted by both sides in this case that the word *Devadayam* could be rightly used for an endowment of any religious or pious institution. Therefore the word *Devadayam* in itself does not signify that the lands referred to in the register constituted an endowment of a mosque. But in the column headed "description of *inam*" appears under the date of the 9th March, 1864 the entry "For the support of Jalali Fakiri mosque." In the register of the 12th March, 1864, the entry is "For the support of Jalale mosque. It is well kept up." Column 13 was for the insertion of the name of the original grantee. In the register of the 9th March, 1864, the name of Dharvesh Ali Sha is inserted; and the entry of the 12th March, 1864, is "For Jalale mosque Dharvesh Ali Sha." In both cases in column 16 which was intended for the insertion of the name of the then owner are inserted the names of the managers of the "Jalale Fakir Dharvesh Ali Sha mosque." In the remarks column under the date the 12th March, 1864, there are these statements:

"The *inam* is enjoyed in six shares by the six managers who are the lineal descendants of the grantee.

The share enjoyed by the father of the manager No. 1 formed the subject of a lapse report by the Collector, which led to much correspondence.

This correspondence resulted from certain doubts suggested regarding the genuineness of some of the Persian grants produced in support of the *inam* and felt as to the tenure of the *inam* being a mosque grant or mere mutalignan continuable for life. After all, it was admitted according to the terms of the original grant on the copper plate that this was religious grant together with another in tenure referred to in the plate.

The division of the *inam* in six shares was also considered allowable so long as the mosque for the support of which the *inam* was given, was efficiently maintained by the grantee's descendants. The share then vacant was also continued to No. 1. *Vide* Collector's Order of 21-11-1847.

Another lapse on the death of the elder brother of No. 2, named Haidaralisha was reported to Collector in Arzies 1—8—1858, No. 386 and 11—12—1858, No. 671. It was not, however, disposed of by the Collector. There was a terraced mosque which having been swept away by the freshes of 1858, another tiled one has been now rebuilt.

To be confirmed free in one title-deed so long as the mosque exists."

In the statement which was filed by the inamdars in the proceedings before the Inam Commissioner the following entry was made in column 13 which was headed "Particulars of present enjoyment":

"Out of the income derived from this excluding the expenses of the Pallivasal (mausoleum) as per shares set out in column 2, the balance we are enjoying for ourselves."

The meaning of the word "pallivasal" is given in the Tamil lexicon as "mosque." The word here is immediately succeeded by the word mausoleum which indicates that the descendants of the grantee regarded the lands as constituting an endowment of the *durga*.

In *Arunachalam Chettiar v. Venkatachalapathi Guruswāmigal*¹, Lord Shaw in delivering the judgment of the Board said that it must not be forgotten that the preparation of the Inam Register was a great act of state, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. His Lordship proceeded to say:

"It is to be remembered that the Inam Commissioners through their officials made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property the Government was put in possession not only of the conclusion come to as to whether the land was tax free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases; yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam Register."

If the only evidence before the Court were the extracts from the Inam Register, we should, in face of these remarks of their Lordships, feel constrained to hold that the Subordinate Judge was wrong in describing the original grant as personal to Dharvesh Ali Sha. Their Lordships have, however, made it quite clear that the Inam Register is not conclusive with regard to title when there is other evidence bearing on the question. The entries in Wallace's Register and Traverse's Register cannot be ignored, and the entries therein were made long before the entries in the Inam Register. The entries in the two earlier registers give strong indication that the original grant was personal to Dharvesh Ali Sha and we consider that on this question these registers must be accepted in preference to the Inam Register. The entries in them are entirely inconsistent with the case set up by the trustees. Moreover, there is no evidence of any mosque having been erected on the property until we come to the Inam Register. The mosque is admittedly an adjunct of the *durga* and therefore it could not have been built before the tomb of Dharvesh Ali Sha had become recognised as the tomb of a saint. For these reasons we hold that the lands were granted personally to Dharvesh Ali Sha.

We may add that it has not been suggested that the descendants of the grantee had dedicated the lands as an endowment of the *durga* or the mosque. In fact it was throughout accepted that if the Court should hold that the grant was personal to Dharvesh Ali Sha the appeal must fail, subject to the argument on the question of *res judicata*. We have held that the grant was personal to Dharvesh Ali Sha, and we have also indicated that we agree with King, J., that the decree in O. S. No. 96 of 1930 does not operate as *res judicata*.

For these reasons the appeal is dismissed with costs.

B.V.V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SOMAYYA.

Mohammed Ibrahim

.. Appellant*

v.

The Northern Circars Fibre Trading Company, Coconada

.. Respondents.

Registration Act (XVI of 1908), section 2 (6) and (9) and Transfer of Property Act (IV of 1882), section 3—Immovable and movable property—Machinery fixed to a cement platform and held in position by being attached to iron pillars fixed in the ground—Document creating charge over—Registration is necessary as the machinery is immovable property.

The owners of certain bone mills entrusted their management to a company who were referred to in the agreement between them as dubashees. Among other things the dubashees undertook to invest a certain amount in the business and that was to carry interest at a certain rate. It was a term of the agreement that "the monies invested by the dubashees shall be a first charge on the assets of the firm." The main machine of the mill was installed on a small cement platform and held in position by being attached to iron pillars fixed in the ground to a depth of nearly 6 or 7 feet. The agreement was unregistered. On a claim by the company that the provisions of the agreement relating to the charge were nonetheless effective in so far as the plant and machinery were concerned as they were movable property,

Held, that the machinery did not fall within any of the enumerated species of movable property, referred to in clause (9) of section 2 of the Registration Act and hence it was necessary to see whether it was property of a description other than "immovable property" as defined in clause (6) of the same section. From that definition it was clear that what is really movable property may become immovable property if it is attached to the earth or permanently fastened to anything which is attached to the earth. So far as the question of registration was concerned, the Transfer of Property Act and the Registration Act are *in pari materia* and it would be wrong to construe the definition of 'immovable property' in one Act as being different from that in the other in the absence of words clearly pointing to a distinction. Though the degree and nature of the attachment to the earth was a consideration, it was only a minor one. The more important consideration was the object of the annexation which is a question of fact to be determined by the circumstances in each case. In the circumstances of the present case the plant and machinery of the bone mills were immovable property so annexed to the floor of the factory as to become part of it and hence the charge over them created by the unregistered agreement would not be effective.

Appeal against the decree of the Court of the Subordinate Judge, Coconada, dated 23rd December, 1941, and passed in O. S. No. 83 of 1935.

Ch. Raghava Rao, K. Rajah Aiyar and A. Satyanarayana for Appellant.

P. Somasundaram and P. Suryanarayana for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—The appellant in this appeal was the fifth defendant in the suit out of which it has arisen. He is the assignee of a mortgage decree obtained by the third defendant on a mortgage executed on the 6th July, 1934, by defendants 1 and 2 over the property known as the South India Bone Mills at Samalkot. The property comprised land as well as the plant and machinery installed thereon for the manufacture of bone meal. The mortgagors were the owners of three other mills also with which however we are not concerned in this appeal. Prior to the execution of the mortgage aforesaid, the mortgagors had on 16th November, 1933, entered into an agreement with plaintiffs 2 to 4 who were carrying on a business under the name of the Northern Circars Fibre Trading Company, Coconada, which was the first plaintiff in the suit. By this agreement the second defendant who was doing business in the name of C. Raju, Import and Export Company, Coconada, impleaded as the first defendant to the suit, entrusted the management of his several mills to the first plaintiff for a period of two years. The Northern Circars Fibre Trading Company, who were thus entrusted with the management, undertook amongst others to invest a sum of Rs. 25,000 in cash in the business and this amount was to carry interest at 12 per cent. per annum. They were referred to in the agreement as the dubashees. It was a term of the agreement that "the monies invested by the dubashees shall be a first charge on the assets of the firm." The plaintiffs instituted the suit for the recovery of a sum of Rs. 66,746-9-9 as due to them in respect of the moneys invested by them in the business

together with interest and the commission earned by them. They also claimed to be entitled to a first charge on the machinery in the mills, the stock-in-trade and the good-will of the business. The agreement of the 16th November, 1933, had not been registered under the provisions of the Indian Registration Act, but the plaintiffs claimed that the provisions of the agreement relating to the charge were nonetheless effective in so far as the movables, namely, the plant and machinery and the stock-in-trade were concerned.

Subsequent to the institution of the suit a compromise was arrived at between the plaintiffs and defendants 1 and 2 by which these defendants agreed to pay plaintiffs 2, 3 and 4 a sum of Rs. 35,000 in full satisfaction of the claim in suit. Defendants 3 and 4 who were not parties to the compromise contended that the dubashee agreement in so far as it purported to give the plaintiffs a charge over the plant and machinery in the South India Bone Mills at Samalkot was invalid for want of registration because the said plant and machinery were immovable property. The suit was first tried in July 1937 by Mr. Bhaskara Reddi, the then Subordinate Judge who pronounced judgment on the 19th July, 1937, dismissing the suit on the ground that though the agreement purported to create a charge over movables as well as immovable properties it was invalid for want of registration not only in respect of the immovable properties but also in respect of the movable properties because the two sets of properties were inseparable from one another and the charge therefore failed in its entirety. The plaintiffs appealed to this Court in A. S. No. 320 of 1937. The judgment of the Subordinate Judge was reversed and the case was sent back for rehearing, this Court holding that it is possible to separate the movable and the immovable assets and the charge should be regarded as valid in so far as the movables were concerned. The case then came up before Mr. R. M. V. S. Rao for fresh trial and he pronounced his judgment on the 23rd December, 1941, decreeing the suit in so far as the plant and machinery installed in the mill were concerned on the ground that they constituted movable and not immovable property. The fifth defendant who, as we have said, is the assignee of the mortgage decree obtained by the third defendant has preferred this appeal.

The only question raised in the appeal is whether the Subordinate Judge is right in holding that the machinery installed in the premises of the factory at Samalkot is movable property. The learned Judge has found that the main machine is installed on a small cement platform to which it is fixed by means of bolts at the four corners. It is also held in position by being attached to iron pillars fixed in the ground to a depth of nearly 6 or 7 feet. At the same time he was of opinion that the machine can be dismantled into parts and conveniently removed as it is not difficult to break the platform and pull out the iron pillars to which the machine is screwed down. He came to the conclusion that the machinery was movable property by asking himself the question whether the mill (machinery) existed for the land or the land existed for the mill (machinery), that is whether the mill is of primary importance and the land only of secondary importance in this case or *vice versa*. His view appears to be that the bone mill stands embedded in and attached to the earth not for the beneficial enjoyment of the land in which case alone it should be regarded as immovable property but for the beneficial enjoyment of the mill itself which therefore remained notwithstanding the attachment movable property only. After the best consideration we can give to the question we are of opinion that the learned Judge's decision cannot be supported.

The real question which falls to be decided in this appeal is whether the writing evidenced by the dubashee agreement referred to above is required by law to be registered because it purports to create a right, title or interest in immovable property of the value of Rs. 100 and upwards. It is common ground that the value of the machinery is more than Rs. 100 and if it is immovable property, the agreement requires registration in order that the charge may take effect. If the machinery however is movable property, the agreement does not, of course, require registration.

"Movable property" is defined in section 2 clause 9 of the Registration Act as including,

"standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property."

The machinery in question not falling within any of the enumerated species of movable property, referred to in the section, it becomes necessary to enquire whether it is property of a description other than immovable property. Turning to the definition of "immovable property" in clause 6 of the same section we find it is stated that it

"includes land, buildings . . . and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."

From this definition it is clear that what is really movable property may become immovable property if it is attached to the earth or permanently fastened to anything which is attached to the earth. The Transfer of Property Act, 1882, relating to transfers of immovable property contains in section 3 a definition of the expression "attached to the earth" for purposes of that Act. The definition is this :

"'attached to the earth' means—

- (a) rooted in the earth, as in the case of trees and shrubs ;
- (b) imbedded in the earth, as in the case of walls or buildings ; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

It was argued for the appellant that the question whether the dubashee agreement requires to be registered or not is primarily to be decided on the language of the definition of "immovable property" contained in the Registration Act rather than on that to be found in the Transfer of Property Act. The Transfer of Property Act, it will be remembered, governs charges created on immovable property. Section 100 states that :

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

One of the provisions here alluded to is that contained in section 59 which makes instruments creating a charge in respect of property of a value over Rs. 100, compulsorily registrable. If we now turn to section 4 of the Transfer of Property Act, we find it says that section 59 is among a group of sections therein mentioned which should all be read as supplemental to the Indian Registration Act, 1908. So far as the question of registration is concerned, we think that the two Acts are *in pari materia* and it will therefore be wrong to construe the definition of "immovable property" in the one Act as being different from that in the other, in the absence of words clearly pointing to a distinction. Coming back to the definition of "immovable property" in the Registration Act and leaving out the several species of immovable property enumerated therein which are all different from the property here under consideration, it will be seen that the governing principle with respect to immovable property in general is stated in the following words, "things attached to the earth or permanently fastened to anything which is attached to the earth." The first part of the definition implies that what is really movable property may become immovable property by being directly attached to the earth. The second part indicates that though the attachment is not direct, still if the movable property is fastened to something which is directly attached to the earth, it will be immovable property for the purpose of this Act. The Transfer of Property Act, as we have already observed, contains a definition of "things attached to the earth," but not of "things permanently fastened to anything which is attached to the earth." We are however loath to accept as correct a dissection and analysis of the definition given by the Registration Act for the purpose of giving it a wider scope than what is expressed in the definition contained in the Transfer of Property Act. Indeed, it seems to us that clause (c) of the latter definition which refers to a mediate and

not a direct attachment is substantially what is referred to in the second part of the definition in the Registration Act. The inquiry should accordingly be not whether the attachment is direct or indirect but what is the nature of the attachment and what its object and purpose. The question is often a difficult one, but certain rules have been laid down in the decided cases for guiding the Court. The classic statement of the law on this point is that contained in the judgment of Blackburn, J., in *Holland v. Hodgson*¹, where looms attached to the floor and beams of a worsted mill were deemed to be fixtures. It was observed :

"There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land ; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, than by its own weight it is generally to be considered a mere chattel : see *Wiltshire v. Cottrell*,² and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land : see *D'Eyncourt v. Gregory*³. Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed to the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended, lying on those who assert they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel the onus lying on those who contend that it is a chattel."

In *Reynolds v. Ashby and Son*⁴, Lord Lindley dealing with a case where machinery had been obtained on a hire purchase agreement from the owner and attached to a factory for the purpose of working it, observed :

"The purpose for which the machines were obtained and fixed seems to be unmistakable ; it was to complete and use the buildings as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels."

After observing that the English cases were not all reconcilable, His Lordship pointed out :

"In dealing with them (fixtures) attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute."

It will thus be seen that the degree and nature of the attachment is no doubt a consideration but only a minor consideration. The more important consideration is the object of the annexation which is a question of fact to be determined by the circumstances in each case. For instance, if a tenant for years or a tenant for life buys and fixes machinery of great value to the tenement occupied by him, it is unlikely that he would have intended to so attach the machinery as to make it part of the immovable property. In *Subramaniam Chettiar v. Chidambaram Servai*⁵ decided by Wadsworth, J., the question was whether an oil engine which was installed by making a concrete base fitted with bolts and attaching it to the bolts by means of nuts, was movable or immovable property. The engine was installed by a tenant of a building holding a lease for a period of three years for the generation of electricity for lighting and running a cinema. While recognising the difference between the English and the Indian law in regard to fixtures, the learned Judge expressed the opinion that there is nothing in the English cases which made them inapplicable in the determination of the test to be applied for ascertaining whether

1. (1872) L.R. 7 C.P. 328.

2. (1853) 1 E. & B. 674.

3. (1866) L.R. 3 Eq. 382.

4. (1904) A.C. 466.

5. (1940) 51 L.W. 155.

and in what circumstances movables annexed or attached to an immovable property became themselves immovables. The learned Judge observed, if we may say so with respect, quite correctly that :

"If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question must in each case be decided according to the circumstances."

He has pointed out that when the owner of a building installs machinery therein he may well have intended to make a permanent improvement to the premises which he owned in order to facilitate the user of those premises but that a tenant in temporary occupation of leased premises is not likely to have had any such intention in making the improvement and he accordingly held that the oil engine did not become and was not therefore immovable property. As we have already indicated, the more important test is to ascertain the intention of the person concerned when he attaches and installs his own machinery to the land or building. The intention may be express or implied from the circumstances in which he attaches the machinery. In the absence, however, of proof one way or the other it seems to us that it would be proper to apply the test which the Privy Council laid down in *Gokaldas Gopaldas v. Puranmal Premeekdas*¹, for ascertaining the true intention of a purchaser of the equity of redemption when he pays off a prior mortgage and subsequently claims subrogation. Their Lordships observed :

"The obvious question to ask in the interest of justice, equity and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest."

On this principle the intention to be attributed is that of a person acting from motives of self interest. Applying this test, what we find here is this. The second defendant was at the date of the dubashee agreement the owner of the factory and the owner of the bone crushing mill located in it. It is true that before his purchase the site and the land on which the factory stood belonged to one of four partners of the firm which owned the machinery in common having installed it for the purpose of manufacturing bone meal. It was said that until the purchase by the defendant the machinery and the land belonged to different owners and that it would never have been the intention of the partnership to treat the machinery as part of the land. While we agree that there is considerable force in this argument, we cannot assent to the proposition that when the second defendant purchased the land and the machinery he continued to have the same intention which his vendors had before him. There was no reason whatever for thinking that he intended to keep the two things apart. It is obvious that his object was to become the owner of both for the purpose of carrying on the business and for his own and individual benefit. If the argument is correct, namely, that the same intention which the vendors had must be attributed to the purchaser, the only way of establishing a different intention would be by the purchaser removing the machinery from the ground to which it was annexed and again attaching it with the express intention of making it part of the land. We cannot imagine that the law requires any such procedure to be adopted for inferring an intention on the part of the purchaser to make the machinery part of the land.

Taking all the circumstances of the case before us, we are of opinion that the plant and machinery of the bone mill are immovable property so annexed to the floor of the factory as to become part of it. It follows that the appeal must be and is accordingly allowed. The suit is dismissed as against the fifth defendant. The appellant is entitled to his costs here and in the Court below.

V.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* and MR. JUSTICE SHAHABUDDIN.

The Government of the Province of Madras, through the Collector of Ramnad at Madura

... *Appellant**

v.

Al. Ar. Rm. Vellayyan Chettiar and others

... *Respondents.*

Civil Procedure Code (V of 1908), section 80—Provisions mandatory—Notice to Government against survey officer's decision—Compliance with section essential.

Section 80 of the Civil Procedure Code is express, explicit and mandatory. Where the section has not been complied with, the Court has no jurisdiction to try the action instituted against Government. There can be no question of waiver and no question of estoppel. It is very desirable that objections to the validity of the notice should be taken at the earliest possible moment; but failure to do so will not deprive the section of its force.

Where two proprietors of a village questioned the decision of a survey officer under section 14 of the Survey and Boundaries Act, 1923, and notices were given to the Provincial Government and the Municipal Council within whose jurisdiction the lands lay but the questions was raised that the notice was invalid because only one of the two proprietors (plaintiffs) had given notice,

Held, that section 80 of the Act was not complied with and the notice was invalid.

Bhagchand Dagadusa v. Secretary of State for India, (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338 : I.L.R. 51 Bom. 725 (P.C.) and *Appa Rao v. Secretary of State for India*, (1930) 59 M.L.J. 923 : I.L.R. 54 Mad. 416, applied.

Appeal against the decree of the Court of the Subordinate Judge, Devakottah in O. S. No. 204 of 1939.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The first and second respondents are the proprietors of the village of Karaikudi. They instituted a suit in the Court of the District Munsiff of Devakottah against the Provincial Government and the Municipal Council of Karaikudi for a decree setting aside a decision of a Survey Officer under the Madras Survey and Boundaries Act, 1923. Section 14 of the Act gives an aggrieved party the right of bringing a suit to challenge a decision of the Survey Officer, provided he does so within three years from the date of the notification of the order. The suit was filed on the 13th September, 1936, which was within the time allowed, and the plaintiffs averred that they had given to the defendants the notice required by law. The defendants filed separate written statements on the 3rd February, 1937, but no objection was taken by them to the validity of the notice. Before the District Munsiff a question arose with regard to the value of the subject matter of the suit and it was eventually decided that the value exceeded that of the pecuniary jurisdiction of the District Munsiff. Consequently, on the 30th November, 1938, the plaint was returned to the plaintiffs for presentation to the Court of the Subordinate Judge of Devakottah. It was presented to the Subordinate Judge's Court on the 13th September, 1939. On the 23rd March, 1940, the Municipal Council filed a fresh written statement and their example was followed by the Provincial Government on the 29th of that month. In the new written statements objection was taken to the validity of the notice. A preliminary issue was framed on this question on the 12th November, 1940, and was decided by the Subordinate Judge in favour of the plaintiffs. The case was then tried on the merits and resulted in the order of the Survey Officer being set aside. The appeal has been filed by the Provincial Government against this decree. The Municipal Council, as the third respondent, supports the appellant.

The Provincial Government says that the notice which it received did not comply with the requirements of section 80 as it was only given on behalf of one of the proprietors, whereas there are admittedly two proprietors. The Subordinate Judge held that it sufficiently indicated that there were two proprietors; but here

* Appeal No. 392 of 1942.

23rd March, 1944.

he clearly erred and the learned counsel for the plaintiffs-respondents rightly has made no attempt to support the judgment on this ground. The Subordinate Judge also held that the defendants had waived their right to question the notice and that in any event they were estopped by their conduct from saying that it was bad. The plaintiffs-respondents maintain that here the Subordinate Judge was right.

Section 80 of the Civil Procedure Code says that no suit shall be instituted against the Crown or against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiry of two months next after notice in writing has been given of the claim. The section requires that the notice shall state the cause of action, the name, description and place of residence of the plaintiff and the relief that he claims and that the plaint shall contain a statement that the notice has been served. Section 350 of the Madras District Municipalities Act, 1920, contains similar provisions with regard to suits against Municipal Councils. Before the decision of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*¹, there was some divergence of opinion in India with regard to the interpretation of section 80, Civil Procedure Code, but their Lordships' decision in that case set all doubts at rest. They said that the section is express, explicit and mandatory, and it admits of no implications or exceptions. They added that it imposes a statutory and unqualified obligation upon the Court.

Before dealing with the question of waiver and estoppel, we may mention that in the course of his arguments on behalf of the plaintiffs-respondents, Mr. V. Ramaswami Ayyar suggested that notice given on behalf of one of the plaintiffs was a sufficient compliance with the section, and in this connection he referred to the decision of this Court in *Secretary of State for India in Council v. Perumal Pillai*², where it was held that a notice was not invalid because it only proceeded from two out of three joint owners. That case was decided long before the judgment of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*¹. The question has, however, been raised in this Court since the pronouncement of their Lordships. In *Appa Rao v. Secretary of State for India*³, Sundaram Chetty, J., held that where the notice had been given by only one of two plaintiffs who had instituted a suit against the Secretary of State, it was not a compliance with the section; and his judgment was upheld by a Division Bench in an appeal under clause 15 of the Letters Patent. *Appa Rao v. Secretary of State*⁴. That judgment is binding on us, but we may add that we find ourselves in complete agreement with it. As section 80 requires the notice to state the name of the plaintiff, the names of all when there are more than one must be given.

Support for the argument based on waiver and estoppel is to be found in the decision of the Bombay High Court in *Hirachand Himatlal v. Kashinath Thakurji*⁵, in that of the Calcutta High Court in *Purna Chandra Sarkar v. Radharani Dasia*⁶ and in that of the Patna High Court in *Ramanarain v. Ramkishun*⁷. But we consider that the learned Judges who decided those cases had not sufficient regard to the wording of section 80 and to its interpretation by the Judicial Committee in *Bhagchand Dagadusa v. Secretary of State for India*¹. In *Hirachand Himatlal v. Kashinath Thakurji*⁵ a Division Bench of the Bombay High Court held that delay in objecting to the notice under section 80 even of long duration would not be a ground in itself for holding that the notice had been waived, but if the plaintiff were prejudiced by the delay it would be another matter and in such circumstances the defendant must be deemed to have waived his right to notice. In that case the objection to the notice had been taken at such a late stage that a fresh suit would have been time barred. It was in these circumstances that the Court considered that the doctrine of waiver operated. The decision of the Calcutta High Court in *Purna Chandra Sarkar v.*

1. (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338 : 416.
I.L.R. 51 Bom. 725 (P.C.).

2. (1900) 110 M.L.J. 117 : I.L.R. 24 Mad.

279.

3. (1930) 59 M.L.J. 923 : I.L.R. 54 Mad.

4. (1935) 41 L.W. 591.

5. (1942) 44 Bom.L.R. 727.

6. A.I.R. 1931 Cal. 175; 53 C.L.J. 51.

7. A.I.R. 1934 Pat. 354.

*Radhurani Dasia*¹ was to the same effect and based on similar facts. The reasoning of the Patna High Court in *Ramanarain v. Ramkishun*² was also the same.

Section 80 says expressly that no suit shall be instituted until the expiration of the two months after the notice. Therefore, if the notice given is defective, as is the case here, the section has not been complied with, which means that the Court has no jurisdiction to try the action. The language of the section is in the imperative and consequently there can be no question of waiver and no question of estoppel. It is very desirable, of course, that the defendants should take an objection at the earliest possible moment, but failure to do so will not deprive the section of its force. If the section works hardship it is for the Legislature to remedy it as the Privy Council has pointed out. Support for our opinion is to be found in the judgment of Venkataramana Rao, J., in *Marina Ammayi v. Secretary of State for India in Council*³, where it was held that it was not open to a Collector to waive a plea as to want of proper notice under section 80. In that case the suit was filed before the expiration of the two months. The objection was not taken until the trial had commenced. The learned Judge said that having regard to the imperative nature of the provisions of the statute it was not open to the Collector to waive the requirements of the section and referred to the decision of the Privy Council in *Gaekwar of Baroda State Railway v. Hafiz Habibul Haq*⁴. In that case a suit had been filed against the Gaekwar of Baroda State Railway through the manager and engineer-in-chief of the undertaking. That official appeared and pleaded that the suit as framed was not maintainable as the Railway was owned by the Maharaja Gaekwar of Baroda, a sovereign prince, and was managed by his Government. It was pleaded that the privilege under sections 86 and 87 of the Civil Procedure Code had been waived. Their Lordships held that there could be no waiver in such a case. The provisions of sections 86 and 87 were imperative and having regard to the public purpose which they serve they could not be waived. The same reasoning applies here.

As the appeal must be allowed on the ground that section 80 of the Civil Procedure Code was not complied with, it is not necessary for us to discuss the merits. The appellant is entitled to costs here and below and they will be paid by the plaintiffs-respondents.

K.C.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SOMAYYA.

Navaneethammal

Appellant*

v.

Ammakannammal and others

Respondents.

Decree—Modes of attack—Direct and collateral—Distinction—Preliminary decree in suit claiming partition by virtue of the Hindu Women's Rights to Property Act—Declaration of share in agricultural lands also—No appeal—Subsequent decision of Federal Court declaring the Act not applicable to agricultural lands—Objection raised to inclusion of such properties in the commissioner's scheme for division—Collateral attack of the preliminary decree could not succeed.

If a Court wrongly allows an untenable claim, the error may be corrected by resort to one or other of the modes known to law, viz., by review, appeal, revision or by suit, according to circumstances. They are direct attacks which will succeed if the error of fact or the deviation from law which is said to vitiate the decree or order is established. But a collateral attack, is, an attempt to avoid, defeat or evade the decree or order or deny its effectiveness by or in a proceeding, other than a direct attack, with the object of rendering it a dead letter, a nullity to be ignored and can only succeed if an absolute lack of jurisdiction over the subject-matter is established. An erroneous decision by a Court of competent jurisdiction is not open to collateral attack.

1. A.I.R. 1931 Cal. 175.

2. A.I.R. 1934 Pat. 354.

(1941) 1 M.L.J. 328.

*Appeal No. 314 of 1942.

4. (1938) 2 M.L.J. 11 : L.R. 65 I.A. 182 : I.L.R. 1938 All. 601 (P.C.).

In 1939, a Hindu widow filed a suit for partition and recovery of a share of the property left by her husband, by virtue of the Hindu Women's Rights to Property Act. A preliminary decree was passed in 1940 declaring her rights to a share in all the properties including agricultural lands. There was no appeal against the preliminary decree. When the commissioner's report submitting a scheme for the division of the properties came before the Court in 1941, the Federal Court had, just then, decided that the Act did not operate to regulate succession to agricultural land in the Governor's provinces. The contesting defendants raised this point in their objections to the commissioner's report. The Subordinate Judge held that though the preliminary decree had become final it was open to him to rectify it in the light of the Federal Court decision. On appeal *held*, that it was wrong to think that the preliminary decree was illegal in the sense that it was made without jurisdiction and that it was therefore open to correction, though it had become final. The suit as filed fell within the jurisdiction of the Court which passed the preliminary decree. Though, the preliminary decree was passed on what later on was declared to be an error, the error was merely an error of judgment, not touching the jurisdiction of the Court, which remained as it was, wholly unimpaired by anything contained in the Hindu Women's Rights to Property Act. The preliminary decree was sought to be challenged by a collateral attack after the contesting defendants had let go the right and opportunity to challenge its correctness by an appeal, that is to say, by a direct attack and as such could not succeed.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, dated 15th September, 1941, 30th October, 1941. (I.A. No. 920 of 1940) and 31st March, 1942, (I.A. No. 1014 of 1941 in O.S. No. 50 of 1939).

N. Rajagopala Aiyangar for Appellant.

T. L. Venkatarama Aiyar and L. Krishnaswami Aiyar for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—This appeal arises out of a suit instituted by the appellant for partition and recovery of a share of the property left by her deceased husband Thangavelu Pillai by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937. This Act became law on the 14th April, 1937, when it received the assent of the Governor-General. Before the Act, a widow had no right to a share in any part of her husband's property, if the husband died as a member of a co-parcenary or had left a son or sons surviving. For the first time the Act gave her such a right.

Thangavelu Pillai who died on the 28th June, 1939, had married three wives in succession. The appellant is the second of his wives. Her two co-widows are Ammakanni Ammal and Dhanabagiammal, impleaded as defendants 1 and 2 in the suit. His only son, Kanakasabapathi still a minor, by his third wife Dhanabagiammal was joined as the third defendant. It is common ground that the estate left by Thangavelu Pillai comprised amongst others, agricultural lands. Under the Act, the appellant is entitled to an one-sixth share in the divisible properties. No question arises about the quantum of the share; the only question is, what are the properties liable for division in the suit.

The suit was instituted on the 5th July, 1939, more than two years after the enactment of the Hindu Women's Rights to Property Act, 1937. In her plaint the appellant claimed a share in all the assets left by Thangavelu Pillai, including the agricultural lands. Neither in the written statements filed by the defendants nor in the issues framed for trial was objection taken to the demand for a share in such lands on the ground that the Act did not apply to agricultural lands. It was not pleaded that so far as such lands are concerned her claim should be determined by the ordinary Hindu law and not by the Act. The result was that when the Subordinate Judge came to pass the preliminary decree on the 31st July, 1940, he declared the right of the appellant to a share in all the properties in suit including the agricultural lands and directed the appointment of a Commissioner for effecting a division by metes and bounds. In pursuance of the preliminary decree the plaintiff applied on the 2nd October, 1940, for the appointment of a Commissioner for effecting the division, and for the passing of the final decree. Accordingly on the 30th October, 1940, the Court appointed a Commissioner for effecting the division of the properties, and he made his report on the 14th April, 1941, submitting a scheme for the division

of the immovable properties which consisted of house property of the value of Rs. 22,000 and agricultural lands of the value of Rs. 14,280. It is obvious that up to this point of time, the parties, as well as the Court and the Commissioner all proceeded on the assumption that the Act applied to every species of property in a Governor's province, without exception and that the plaintiff was entitled to a share in the entirety of her husband's estate. It would seem that just at this time, the question whether the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937) and the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938) operated to regulate succession to agricultural land, a subject which fell within the exclusive jurisdiction of the Provincial Legislature by reason of Entry No. 21, Part II of Schedule VII of the Government of India Act, 1935, was pending decision in the Federal Court. On the 22nd April, 1941, that Court pronounced its judgment declaring that the Acts in question do not operate to regulate succession to agricultural land in the Governor's provinces. It was after the publication of this decision that the contesting defendants, namely, defendants 2 and 3, woke up to discover that the appellant was not entitled under the provisions of the Hindu Women's Rights to Property Act, 1937, to claim a share in agricultural lands and they accordingly took the point in their objections to the report of the Commissioner filed on the 23rd June, 1941. The matter came up before the Court on the 13th September, 1941, when the Subordinate Judge framed the following questions for decision:—

"1. Whether the plaintiff and defendants 1 and 2 are entitled to have a final decree passed also in respect of the agricultural lands of their husband; and

2. Whether the Commissioner's report should be accepted."

After hearing arguments, the Subordinate Judge pronounced his order on the 15th September, 1941. He held that notwithstanding the fact that the preliminary decree which had not been appealed against had become final, it was open to him to rectify that decree, by giving effect to the decision of the Federal Court and accordingly ruled that the agricultural lands should be excluded from division in the final decree to be passed. The reasons he gave for the view he took may be stated in his own words,

"It follows from the decision of the Federal Court that the Imperial legislature had no power to pass legislation affecting agricultural lands and that the provisions of the Hindu Women's Rights to Property Act cannot affect the agricultural lands. But it is only in pursuance of such illegal legislation that a preliminary decree has been passed. Now when it is clear that the legislation itself is bad, a decree of Court giving effect to the said legislation must also be bad and must be held to be illegal on the face of it and as such I think, no Court can give effect to an illegal decree. In fact the decree must be construed to be one passed without jurisdiction, since the Court gets jurisdiction to pass such a decree only by virtue of the said Act which has now turned out to be an illegal one in so far as the agricultural lands are concerned".

It is obvious that by the expression "illegal legislation" here used, the Subordinate Judge only meant to convey the idea that the Indian legislature had exceeded its powers in enacting a law regarding succession to agricultural land situate in a Governor's province and, that to the extent to which it purported to do so, the enactment must be held to be null and void. Therefore he regarded the preliminary decree which had not taken note of this illegality as also illegal on the face of it, so much so he thought it his duty to bring it into conformity with the law by excluding the agricultural lands.

The appellant contests the correctness of this decision and on her behalf it is urged that the Subordinate Judge is in error in thinking as he presumably did, that the preliminary decree is illegal in the sense that it was one made without jurisdiction in so far as the agricultural lands were concerned and that it was therefore open to him to correct it, notwithstanding that it had become final. That it has become final is not questioned. For section 97 of the Civil Procedure Code clearly enacts that,

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree".

The finality which, in the events which have happened, attaches to the decree will, of course, be of no consequence if the Court had purported to exercise its jurisdiction under a statute which did not in fact confer it. The Subordinate Judge is apparently of the opinion that he derived his jurisdiction to pass the preliminary decree from the Hindu Women's Rights to Property Act, 1937, and as that Act did not confer on him jurisdiction in respect of agricultural lands the decree passed by him on the footing that it did, is a nullity. This, in our opinion, is a fundamental error due to a misconception of a source of his jurisdiction which is really derived not from that Act but from the Madras Civil Courts Act, 1873, and the Civil Procedure Code, 1908. Section 4 of the former Act empowers the Provincial Government to fix the number of Subordinate Judges to be appointed under the Act and to vary it from time to time. Each of the Judges so appointed is authorised to exercise all or any of the powers conferred on the Court by that Act or any other law for the time being in force. Section 12 enacts that "the jurisdiction of a District Judge or Subordinate Judge extends, subject to the rules contained in the Civil Procedure Code, to all original suits and proceedings of a civil nature". A Subordinate Judge accordingly possesses unlimited pecuniary jurisdiction, unlike a District Munsif whose jurisdiction is limited to suits in which the amount or value of the subject-matter does not exceed Rs. 3,000. If we now turn to the Civil Procedure Code the first section to be noticed is section 9 which confers on the Courts established by law, jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The explanation to the section makes it plain that a suit in which the right to property is contested is a suit of a civil nature. Section 15 states that every suit shall be instituted in the Court of the lowest grade competent to try it. Section 16 and the sections which immediately follow it lay down the rules which determine territorial jurisdiction. Tested by these sections, it is common ground that it is the Court below which is the Court competent to try the present suit, possessing, as it did, the necessary jurisdiction pecuniary as well as territorial. It is needless to add that suits of this nature have not been excepted from the cognizance of the Subordinate Judge's Court. It would thus seem that all the conditions necessary for conferring jurisdiction upon the Subordinate Judge were present and he was therefore competent to try the suit.

If we now look at the plaint and consider it in the light of the decisions of the Federal Court, the only criticism to be made is that it includes a claim for the partition and recovery of a share in properties in which the Hindu Women's Rights to Property Act, 1937, did not give her a share. In other words, the plaint included a claim which was untenable and which might even be taken as being untenable on the face of it, though the untenability was only discovered after the decision of the Federal Court.

The untenability of a claim is undoubtedly a reason for disallowing it. But, if the Court wrongly allows it, the error may be corrected by resort to one or other of the modes known to law, *viz.*, by review, appeal, revision or by suit, according to circumstances. Such attempts to vacate, modify or correct a decree of a competent Court by proceeding in one of the modes permitted by law are what may be termed, direct attacks which will succeed if the error of fact or the deviation from law which is said to vitiate the decree or order is established. But a collateral attack, is, an attempt to avoid, defeat or evade the decree or order or to deny its effectiveness by or in a proceeding, other than a direct attack, with the object of rendering it a dead letter, a nullity to be ignored. If we bear this distinction in mind, it is clear that the preliminary decree originally passed by the Subordinate Judge was sought to be challenged by what was in substance a collateral attack after the contesting defendants had let go the right and oppor-

tunity they undoubtedly had under the law to challenge its correctness by an appeal, that is to say, by a direct attack. The question thus presented is but an aspect of the doctrine of collateral attack which as will be shown can only succeed if an absolute lack of jurisdiction over the subject-matter is established.

*Ledgard v. Bull*¹ is a decision of the Privy Council in the course of what should be deemed a direct attack against the judgment of the District Judge of Cawnpore in a suit for the infringement of a patent, instituted in the Court of the Subordinate Judge of the same place. By section 22 of the Act XV of 1859, an action for the infringement of a patent was maintainable only in the principal Civil Court of original jurisdiction which was the District Court. The District Judge having withdrawn the suit to his own file on a petition for transfer filed before him under section 25 of the Civil Procedure Code, 1877, tried and decreed the suit, overruling both of two objections specifically taken by the defendant in his written statement. Of these one alone is relevant for the present purpose. That objection was that under the Act XV of 1859 the Court of the Subordinate Judge in which the suit was filed was incompetent to entertain it and that this initial defect is not cured by the transfer, because the order of transfer was itself incompetent, as the District Court had no jurisdiction to make an order of transfer unless the Court from which the transfer was sought had itself jurisdiction to try it. The objection thus taken to the jurisdiction of the District Judge was sought to be got over by a plea of waiver by reason of the conduct of the defendant in concurring with the plaintiff in the application for the transfer, but this plea was negatived. The Board had thought it necessary to examine and expound the law relating to the question of jurisdiction as commonly spoken of, and the observations in this behalf are of much value in the present context. Their Lordships said,

"The defendant pleads that there was no jurisdiction, in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought, and their Lordships do not doubt that in such a case a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when those are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit."

The distinction here drawn is between the case where a Court has no inherent jurisdiction, and its judgment is therefore wholly void, *coram non iudice*, and a case where the proceedings are taken in a Court of competent jurisdiction, but irregularities are committed which if objected to in time would have entailed a dismissal. Although the consequences of a mere error of decision in the latter classes of cases are not in terms stated, the observations of the Board sufficiently imply that the judgment would not be open to avoidance or evasion by collateral attack if the party who had the opportunity omitted to take advantage of it by taking the objection at the proper time, and, if we may add, by the proper mode as well. The observations extracted above were repeated by the Privy Council in *Minakshi v. Subramaniam*², which was an appeal from a decision of the Madras High Court in an appeal which had been heard and disposed of against the decision of the District Judge of Madura. No appeal really lay from the order of the District Judge, but the objection to its maintainability had not been taken before the High Court. The judgment of this Court was set aside with the comment that in the case on hand there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could confer that jurisdiction which the High Court never possessed. This case pro-

1. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).

2. (1887) L.R. 14 I.A. 160 : I.L.R. 11 Mad. 26 (P.C.).

vides another instance of a direct attack. *Malkarjun v. Narhari*¹ furnishes an illustration of the doctrine of collateral attack which can prevail only if the Court which made the decree or order questioned, had acted wholly without jurisdiction. Nagappa had mortgaged his properties to the defendant who subsequently purchased them at a sale in execution of a simple money decree obtained by a stranger against the mortgagor. The question was whether the Court sale was a nullity, because the preliminary notice of the execution petition, required by section 248 of the Code of 1877 corresponding to Order XXI, rule 22 of the present Code was served on two persons, Ramalingappa and Wyankappa, wrongly stated to be the legal representatives of the deceased judgment-debtor; the true legal representatives namely the plaintiffs, not having been served at all. Ramalingappa objected that he was not the legal representative, but the executing Court wrongly held that he was the true representative and went on with the execution, with the result that the property was ultimately sold to the defendant. The plaintiffs who could have had the sale set aside either by application under section 311—now Order XXI, rule 90 of the Code, or by suit within one year under Article 12, Clause (a) of the Limitation Act, took neither course, but instituted a suit for redemption entirely ignoring the Court sale. The defendant set up his purchase in Court auction in defence of the suit. The Trial and the Appellate Court dismissed the suit, but on second appeal the High Court of Bombay granted in effect a redemption decree as prayed for by the plaintiffs. The defendant appealed to the Privy Council, and their Lordships reversed the judgment of the High Court, and dismissed the suit. After observing that the decision of the High Court must rest on the principle that the sale was an absolute nullity, having been held in proceedings taken by the executing Court wholly without jurisdiction Lord Hobhouse pointed out that the case was one in which the Court had jurisdiction to act but only it committed an error in deciding that Ramalingappa was the right legal representative, an error which did not render the sale null and void. The grounds of the decision will appear from the following passage:

"The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramalingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law".

The language employed in this passage suggests that where the Court has jurisdiction over the subject-matter, but arrives at an erroneous decision by misconstruing a statute, it can only be set aside by appropriate proceedings directly taken for the purpose and not simply ignored as a nullity. That is the reason why their Lordships point out later in their judgment that it was necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. They finally observe at page 352 that if the sale is valid until vacated, that is, if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law, as the case fell either within section 311 (now Order XXI, rule 90), Civil Procedure Code or within Article 12 (a) of the Limitation Act, 1877, or within both. This case would therefore seem to be a clear authority for the proposition that an erroneous decision by a Court of competent jurisdiction is not open to collateral attack, and can only be corrected or vacated by proceedings in the nature of a direct attack taken in the manner and within the time allowed by law unlike a decision of a Court wholly without jurisdiction,

1. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216 : I.L.R. 25 Bom. 337 (P.C.),

which can be collaterally attacked as a nullity on account of the absence of inherent jurisdiction over the subject-matter. The test to be applied in deciding a question of this kind is to enquire whether a Court had the power and was under a duty to decide the matter, the wrong decision of which is alleged to make the order a nullity. This indeed was the test applied in *Nageswara v. Ganesa*¹, where the question was whether an order of adjudication passed on a debtor's petition containing a false allegation of residence in Madras made in order to invoke the insolvency jurisdiction of this Court was a nullity, and this objection was put forward in an interpleader suit instituted for determining whether the Official Assignee or a creditor of the insolvent was entitled to a sum of money. The objection was negatived on the ground that the High Court was a Court of competent jurisdiction notwithstanding that the debtor was not in fact a resident of Madras as the question of residence was a matter which the Court was entitled and bound to decide before making the order of adjudication. It was observed:

"A distinction has always to be made between competency or jurisdiction to make an order, and the correctness of the order on the merits where the Court had the jurisdiction to decide the question. We are of opinion that the High Court was a Court of competent jurisdiction for the present purpose and notwithstanding the fact that the debtor made a deliberately false allegation that he was a resident within the jurisdiction, the order is not rendered a nullity".

The consequences of a complete absence of jurisdiction have been stated in a number of decisions of the Calcutta High Court, but it is sufficient to refer to one of them only for the purpose on hand. In *Rajalakshmi Dassee v. Katya-yani Dassee*², Mookerjee and Carnduff, JJ., said:

"It is an elementary principle of law that, if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented: *Ferguson v. Mohan*³, *Briscoe v. Stephens*⁴, *Buchanan v. Eucker*⁵, *Attorney-General v. Hotham*⁶, *Perkin v. Proctor*⁷, *Ex parte Kinnings*⁸, *Brown v. Compton*⁹. If a Court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction of the law".

The questions whether an executing Court is entitled to go behind the decree or question its validity on the ground that the Court which passed it had no jurisdiction over the subject-matter may at first sight look as if they involve an aspect of the doctrine of collateral attack which we are now considering. But such cases do not appear to be germane to the present discussion. Differing views have been expressed on this question by the Madras (*Zamindar of Ettiyapuram v. Chidambaram Chetti*¹⁰) and the Rangoon High Courts *S. A. Nathan v. S. R. Samson*¹¹ on the one hand and the Calcutta High Court on the other *Gorachand Holder v. Profullakumar Roy*¹² and *Kalicharan Singh v. Bibhutibhusan Singh*¹³. We doubt whether cases of this type furnish useful guidance, because as pointed out by Wallis, C.J., in *Zamindar of Ettiyapuram v. Chidambaram Chetti*¹⁰ the jurisdiction of the executing Court as such is circumscribed by the words of section 47 of the Civil Procedure Code. The matter is besides complicated by the change in the language of Order 21, rule 7 introduced by the Code of 1908. The following observations of the learned Chief Justice indicates the difference in principle due to the special provisions of the Code:

1. (1942) 2 M.L.J. 198 : I.L.R. (1943) Mad. 217.

2. (1910) I.L.R. 38 Cal. 639 at 668.

3. (1839) 11 A. & E. 179.

4. (1824) 2 Bing. 213.

5. (1808) 9 East 192.

6. (1823) T. & R. 209.

7. (1768) 2 Wilson, 382.

8. (1847) 4 C.B. 507 at 525.

9. (1800) 8 T.R. 424.

10. (1920) 39 M.L.J. 203 : I.L.R., 43 Mad. 675 (F.B.).

11. (1931) I.L.R. 9 Rang. 480 (F.B.).

12. (1925) I.L.R. 53 Cal. 166 (F.B.).

13. (1932) I.L.R. 60 Cal. 191.

"An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the execution, discharge or satisfaction of the decrees which are required by section 47 to be dealt with in execution. The provisions in section 225 of the old Code that a Court might proceed to execute decrees transferred to it without requiring further proof, among other things, of the jurisdiction of the Court which passed the decree lent some colour to the view that it was open to a Court to which a decree had been sent for execution to go into the question whether the Court which passed that decree had jurisdiction to do so, and influenced the decisions which are referred to in the order of reference. These words, however, have been omitted advisedly in the corresponding Order 21, rule 7 of the new Code."

In the light of the foregoing discussion it appears to us plain that the decision of the Court below cannot be supported. It is unquestionable that the nature and the value of the subject-matter was such that the suit fell within its jurisdiction. The preliminary decree was no doubt passed on what we may now take it to be an error in that it recognised in the plaintiff a right to a share in the agricultural lands which had not been really conferred on her by the Hindu Women's Rights to Property Act, 1937, as it was wrongly thought. But this error was merely an error of judgment, not touching the jurisdiction of the Court, which remained as it was, wholly unimpaired by anything contained in that Act. In this view the decision of the Subordinate Judge must be set aside. The case will now go back to him for the passing of a final decree after such enquiry as may be necessary, by a commissioner or otherwise, in accordance with the declaration of rights made by the preliminary decree.

It is only necessary to add that the Court or the Commissioner as the case may be should consider afresh the points which require to be determined before the passing of the final decree. The Subordinate Judge's direction that the memo. given by defendants 2 and 3 regarding the annual rents of the properties should be preferred to that of the plaintiff is irregular and must be vacated. The commissioner should be left to decide the matter as best as he could, the Court interfering with his findings later, if that is necessary, for a correct decision of the matter. Nor is there any justification for the Subordinate Judge allotting item 12 to the third defendant at a valuation of Rs. 1,500, while the plaintiff was willing to take it at Rs. 1,800 and herself face the litigation if there should be any. As we have said the whole matter should be considered afresh.

The appellant is entitled to her costs here and in the Court below.

V. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHAUDDIN.

G. J. Subbarayalu and another

*Appellants**

v.

A. R. M. A. N. Annamalai Chettiar

Respondent.

Indian Contract Act (IX of 1872), sections 64, 73 and 74—Written agreement to sell and buy with conditions regarding forfeiture of earnest money, mode of payment of the remaining sale price, and vendor's right in default—Whether vendor can enforce his rights when the purchaser has defaulted.

On 21st August, 1941, the appellants agreed to buy from the respondent a cinematograph projector and its accessories (of a German make and for which the demand was far greater than the supply) for Rs. 4,500 on the following conditions in writing, *viz.*, (i) the buyers were to pay an advance of Rs. 1,000 which could be forfeited by the vendors in the event of default on the part of the buyers in the performance of the contract; (ii) the balance of the consideration of Rs. 3,500 was to be paid in monthly instalments of Rs. 350 from a particular date; (iii) in the event of default by the purchaser the vendor could forfeit the advance, demand the immediate return of the machine and charge rent at the rate of Rs. 350 per month during the period the machine was in the possession of the buyers or the vendor could demand the immediate payment of the balance of purchase money with interest at 6 per cent. per annum. The purchaser defaulted in the payment of the instalments.

On the question whether the respondent is entitled to forfeit the deposit and insist on the return of the projector with hire at the rate agreed upon,

Held, (i) that the case was not one of hire purchase, as the option given to the prospective purchaser to terminate the contract and return the chattel which is an essential feature of hire purchase contracts is absent in the present case;

(ii) that neither section 64 nor 73 of the Contract Act is applicable to a deposit of this nature because the stipulation for its forfeiture in case of breach is not one by way of penalty and the deposit was not unreasonable in the circumstances; and

(iii) that the appellants (purchasers) cannot be called upon to pay the value of the machine at the date of contract *plus* hire, but merely the present value *plus* hire.

Lee v. Butler, (1893) 2 Q.B. 318; *Auto Supply Co., Ltd. v. Raghunatha Chetty*, (1929) 57 M.L.J. 618; I.L.R. 52 Mad. 829; *Manian Pattar v. The Madras Railway Co., by its Agent and Manager*, (1906) 16 M.L.J. 37; I.L.R. 29 Mad. 118; *Abbakke Heggadthi v. Kunhiamma Shetti*, (1906) I.L.R. 29 Mad. 491, referred to.

Natesa Aiyar v. Appavu Padayachi, (1913) 24 M.L.J. 488; I.L.R. 38 Mad. 178 (F.B.), followed.

On appeal from the judgment and decree of Bell, J., dated 11th January, 1943, and passed in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. No. 40 of 1942.

R. Gopalaswami Aiyangar and *S. Sankara Aiyar* for Appellants.

R. Rangaswami Aiyangar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellants are the proprietors of a cinematograph theatre at Madura. On the 21st August, 1941, they agreed to buy from the respondent, and the respondent agreed to sell to them, a cinematograph projector and its accessories for the sum of Rs. 4,500 on conditions set out in writing. The conditions were these :

“1. The buyers were to pay as an advance the sum of Rs. 1,000 which was to be treated as security for the due performance by them of the contract. In the event of default on their part, the Rs. 1,000 was to be forfeited.

2. The balance of the purchase consideration, Rs. 3,500, was to be paid in ten equal monthly instalments commencing on the 30th of September, 1941.

3. If the buyers defaulted, the vendor had the option to adopt one of two courses. He could forfeit the advance, insist on the return of the machine and its accessories and charge rent therefor at the rate of Rs. 350 per month for every month the articles remained in the hands of the buyers. In the alternative, the vendor could demand immediate payment of the entire balance of the purchase consideration with interest at six per cent. per annum.

4. The property in the machine was not to pass to the buyers until they had paid the purchase price in full.”

On the 30th September, 1941, the appellants paid Rs. 350, but in October only Rs. 50 and in November only Rs. 200. The sum of Rs. 350 was tendered and accepted without prejudice after the suit had been filed. The fact that it was accepted without prejudice was not stated in the written statement, as it ought to have been. As the appellants were in default, on the 26th December, 1941, the respondent through his advocate wrote to the appellants demanding possession of the projector. This letter was not delivered. We have no doubt that the first appellant himself was responsible for the non-delivery. It was tendered at his Madura address, at Mysore, Madras and again at Madura, as the post marks show. On the 18th February, 1942, the respondent's advocate wrote another letter demanding possession of the machine and payment of the amount due for hire. This letter was no doubt delivered, but it was not answered. The appellants allege that they wrote to the respondent on the 20th February, 1942, and again on the 25th February, but the respondent denies that these letters were ever received. The letter of the 20th February, 1942, makes no reference to the respondent's letter of the 18th of that month, but it contains the statement that the amount due in respect of the projector was Rs. 685-4-9. The letter of the 25th February, 1942, makes no reference to the respondent's letter of the 18th. The respondent's case is that these letters were never sent and alleged copies have been put in with the object of strengthening the appellant's case. We consider that this criticism is well founded. The suit was filed on the 2nd March, 1942. In their written statement the appellants pleaded that they had paid Rs. 1,700 on the 12th December, 1941, and that only Rs. 313 was due at the date of suit.

The action was tried by Bell, J., who accepted the respondent's version of the facts. The learned Judge held that (1) the respondent was entitled to forfeit the deposit of Rs. 1,000 and to recover possession of the projector; (2) the appellants were liable in a sum of Rs. 1,500 for hire of the projector at the rate of Rs. 350 per month up to the date of the plaint and for the further sum of Rs. 3,150 as hire from the date of the institution of the suit to the date of the judgment; and (3) the appellants were to pay the further sum of Rs. 4,500 as the value of the machine, unless they returned it to the respondent within 14 days.

We agree with the learned Judge's findings on the facts. It is impossible to believe that the appellants paid the Rs. 1,700 on the 12th December, 1941, as alleged by them. They admit that they did not get a receipt and the untrustworthy nature of their testimony is to be gathered from the statement that the machine was defective and incapable of producing sound. If it had been in this condition they would not have retained it and they themselves would have repudiated the contract.

The more difficult question is whether the respondent is entitled to forfeit the deposit and to insist on the return of the projector with hire at the rate agreed upon. The respondent admits that the contract does not constitute one of hire purchase and that the case falls within *Lee v. Buller*¹. That this is so cannot really be doubted. In *Auto Supply Co., Ltd. v. Raghunatha Chetty*², this Court pointed out that an essential feature of a contract for hire purchase was the option given to the prospective purchaser to terminate the contract and return the chattel. The option is absent in the present case.

This Court has accepted the proposition that when the circumstances warrant it can grant relief against forfeiture; see *Manian Pattar v. The Madras Railway Co., by its Agent and Manager*³ and *Abbakke Heggadthi v. Kunhiamma Shetti*⁴. In *Natesa Aiyar v. Appavu Padayachi*⁵, a Full Bench of the Court had to consider the question whether sections 64 and 74 of the Indian Contract Act applied in these circumstances. On the 24th February, 1903, A agreed to purchase from B certain lands for a sum of Rs. 41,000, of which Rs. 4,000 was paid in advance. The sum of Rs. 20,000 was to be satisfied by a mortgage on the property and the balance was to be paid in cash before the 24th May, 1903, when the property was to be conveyed. It was agreed that the advance of Rs. 4,000 was to be forfeited if there was delay on the part of the purchaser. The purchaser failed to perform the contract and the seller forfeited the deposit of the sum of Rs. 4,000. According to the headnote, White, C.J. and Miller, J. (*Sadasiva Aiyar, J., dissenting*) held that neither section 64 nor section 73 of the Contract Act is applicable to a deposit of this nature because the stipulation for its forfeiture in case of breach is not one by way of penalty. We do not, however, read the majority decision as indicating that relief can never be given in a case of a deposit, but as meaning that in that case the forfeiture of the deposit was not unreasonable as it merely represented ten per cent. of the purchase consideration. In fact in the course of his judgment, Miller, J., pointed out that there might be cases where the Court must find that the amount of deposit or payment in advance is so great in comparison with the amount payable under the contract that the parties could not have intended it as merely security for performance, but rather as a punishment for non-performance of the contract. The learned Judge went on to add that in such cases the Court might doubtless refuse to allow the retention of the whole of the deposit.

Therefore what we have to consider is whether the forfeiture provisions of this contract are so unreasonable as to justify the Court in granting relief to the buyers. With regard to the advance of Rs. 1,000 there does not appear to be any real ground for saying that the provision for forfeiture is unreasonable. According to the first appellant's own evidence the machine deteriorated at the rate of 20 per cent. per

1. (1893) 2 Q.B. 318.

2. (1929) 57 M.L.J. 618 : I.L.R. 52 Mad. 829.

3. (1906) 16 M.L.J. 37 : I.L.R. 29 Mad. 118.

4. (1906) I.L.R. 29 Mad. 491.

5. (1913) 24 M.L.J. 488 : I.L.R. 38 Mad. 178 (F.B.).

annum. In fact, very little has been said, or could be said, by Mr. Gopalaswami Ayyangar on this question. He has rightly concentrated on the provision of the contract entitling the seller to revoke the contract for purchase and charge hire at the rate of Rs. 350 per month. At first sight this does appear to be a rather harsh provision, but on full consideration we do not think the appellants are entitled to relief. The projector was of German make and, when the contract was entered into, the war with Germany had been in progress for nearly two years. It was impossible to get fresh supplies from the continent of Europe and, as far as the Court knows, from England or America. The demand for such machines must have been far greater than the supply; in fact it is to be doubted whether there was any supply at all. In these circumstances we do not consider a rent of Rs. 350 a month as being unreasonable in case of default. That the appellants could make profitable use of it at this rate is shown by the fact that they have made no attempt to comply with the order of the learned Judge directing them to deliver the machine to the respondent within a fortnight of his judgment. The burden of showing a ground for relief against forfeiture is on the appellants and they have failed to discharge this burden.

There is, however, a further question and here the appellants are on firmer ground. As we have pointed out, the learned Judge directed the appellants to pay Rs. 4,500 the full value of the machine at the date of the contract, in the event of their failure to surrender the machine to the respondent within the time fixed by him. The appellants cannot be called upon to pay the value of the machine at the date of the contract, *plus* hire, but merely the present value, *plus* hire. The only evidence we have of gauging its present value is the evidence with regard to depreciation and on this basis the value must be taken to be Rs. 4,500 less 20 per cent. per annum from the 21st August, 1941, to this day. As the appellants have had the use of the machine from the date of the judgment of the learned Judge to this date they must, however, continue to pay the hire at the rate of Rs. 350 per mensem. Accordingly we vary the decree passed by Bell, J., by directing that in addition to the amount of hire awarded by him the respondent is entitled to Rs. 350 per month from the date of the decree of the trial Court to this date and by ordering the appellants to deliver the projector and its accessories to the respondent within fourteen days from this date or in the alternative pay Rs. 2,250 (Rs. 4,500 less 20 per cent. per annum for two and a half years).

The appellants have succeeded on the question of the present day value of the machine, but have otherwise failed. In these circumstances the parties will pay and receive proportionate costs. We certify for two counsel.

V. P. S.

Decree varied.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

V. K. R. S. T. Firm, now represented by

V. K. R. S. T. Manikkam Chettiar

*Appellant**

v.

The Oriental Investment Trust, Limited, by its Official

Liquidator Mr. G. Rajagopalan

Respondent.

Company—Liquidation—Claim by a firm for moneys lent to one of the managing directors of the company—Managing director authorized to borrow from that firm and invest in shares—Co-managing director head of the lending firm and the borrowing managing director, its Madras agent—Moneys actually lent to company—Gambling in differences and embezzlement by managing director—His knowledge of the fraud not knowledge of the company or firm—Company liable for the borrowings.

A registered company, having for its objects those expected of a company incorporated for the purpose of carrying on business as an investment trust, authorized one of its managing directors, R, to invest the moneys of the company in shares and securities and sell them when deemed necessary and for that purpose to borrow moneys from a firm of

which the co-managing director, *V*, was the head and *R*, its Madras agent. *R* borrowed large sums from the firm and utilized them for the purpose of gambling in differences on behalf of the firm and further embezzled large sums of the company. When the company was directed to be compulsorily wound up, the lending firm claimed to rank as a creditor of the company for the sums lent to the company together with interest thereon. On the official liquidator disputing the validity of the major portion of the claim,

Held, that if *R* had borrowed money from another firm under the authority conferred upon him by the company the lender would not have been put on inquiry as to the application of the money and the company would in such circumstances be liable notwithstanding that *R* had misappropriated the moneys borrowed. *R*'s knowledge of the fraud which he was committing was not the knowledge of the firm or the company. Therefore the company must be held to be liable unless the fact that *V* was a managing director of the company made a difference. In the circumstances of the case, it did not. He knew nothing of *R*'s defalcations until all the money had been borrowed and he cannot be imputed with knowledge notwithstanding that he was a co-managing director of the company and the head of the lending firm which employed *R* as its agent. As the moneys were withdrawn from the firm on behalf of the company under authority given by the company, the company must accept liability unless the firm had knowledge that *R* was abusing his authority, which was not the case.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Bell, dated 2nd March, 1942, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 222 of 1940.

K. Rajah Aiyar and K. Subramanyam for Appellant.

S. Srinivasaraghavan for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—On the 21st July, 1939 the Court passed an order for the compulsory winding up of the Oriental Investment Trust, Limited, a company registered under the Indian Companies Act. An undivided Chettiar family carrying on business under the vilasam of V. K. R. S. T. claimed to rank as a creditor in the sum of Rs. 1,36,274-1-2. The Official Liquidator disputed the validity of the claim, except to the extent of Rs. 6,310-7-0. As the investigation of the question involved a lengthy inquiry, it was decided that it should be tried in accordance with the procedure prescribed for the trial of a suit on the Original Side of the Court. After the pleadings had been closed the suit came on for hearing before Bell, J., who held that the contentions of the Official Liquidator were well founded and consequently only allowed the firm to rank as a creditor for the admitted sum of Rs. 6,310-7-0. This appeal is from the judgment of the learned Judge. It will be convenient hereafter to refer to the V. K. R. S. T. Firm as "the firm" and the Oriental Investment Trust, Limited as "the Company".

The members of the joint family were Kasi Viswanathan, his son Manikam, his brother Narayanan, and Narayanan's son Somasundara. Narayanan died on the 16th January, 1939. Kasi Viswanathan died after the trial and the appeal has been preferred by his son as the manager of the family.

The company was incorporated on the 9th September, 1936 with an authorised capital of Rs. 25,00,000 divided into 25,000 shares of Rs. 100 each. The shares actually issued numbered 6068, and at the date of the winding up order only Rs. 25 per share had been paid by the subscribers. The principal promoters of the company were Kasi Viswanathan and P. L. A. V. A. Ramanathan Chetty, who was then a local director of the Reserve Bank of India. Kasi Viswanathan and Ramanathan were appointed the managing directors, but from the inception of the company the management of its business was left entirely to Ramanathan, who was also the agent of the Madras branch of the firm. Narayanan was the member of the family in charge of the firm, but there is no doubt that Ramanathan controlled the Madras business of the firm as well as that of the company.

The Articles of Association provided that the business of the company should be managed by the directors of whom there were six, including the two managing directors. Authority was given to the directors to delegate their powers to a committee consisting of one or more of their number. A formal agreement was

entered into between the company and the managing directors under which, subject to the control of the directors they were to have "either jointly or severally" the general conduct and management of the business and affairs of the company and without prejudice to their general power, jointly and severally the power *inter alia* of buying and selling shares and securities on behalf of the company and of borrowing Rs. 25,000 without the sanction of the board of directors or Rs. 1,00,000 with the sanction of the board.

The memorandum of association sets out in unambiguous terms the objects for which the company was formed. The objects are restricted to those expected of a company incorporated for the purpose of carrying on business as an investment trust. Naturally power was taken to buy and sell shares, but this has erroneously been interpreted as authority to deal in differences on the stock exchange. From the very beginning Ramanathan, with the full consent of his fellow directors, commenced gambling in differences on behalf of the company. The share subscribed provided a capital of only a little over Rs. 1,50,000. This was supplemented by borrowings from the firm to the extent of Rs. 1,23,136-12-0. The difference between this sum and the sum of Rs. 1,36,274-1-2 claimed by the firm represents interest. Notwithstanding that the funds of the company were so limited, the transactions entered into by Ramanathan on behalf of the company amounted in value to over a crore and a half of rupees and when the company went into liquidation it only possessed securities worth some Rs. 20,000. There is here clear indication of the unlawful nature of the business which was done. In fact, neither in this case nor in proceedings against the directors for misfeasance, which have given rise to Original Side Appeals Nos. 44, 47 and 52 of 1942 (these appeals are dealt with in a separate judgment) has it been denied that the business done was otherwise than that of a gambling nature. The only excuse put forward is that the directors considered that they were entitled to do such business.

At a meeting of the board of directors held on the 10th April, 1937, the following resolutions were passed:—

"(1) Resolved that Managing Director Mr. PL. V. A. Ramanathan Chettiar be and is hereby authorised to invest the moneys of the company in shares and securities and sell them when deemed necessary provided that shares and securities beyond the value of Rs. 1,00,000 (rupees one lakh) shall not be bought or sold except with the permission of any other Director present in Madras.

(2) Resolved that the Managing Director Mr. PL. V. A. Ramanathan Chettiar is authorised to borrow money from Messrs. V. K. R. S. T. Firm as and when it is necessary and the amount borrowed by him till date is approved."

The statutory report, made up to the 3rd April, 1937, was passed at this meeting and disclosed that heavy gambling had already been indulged in. It stated that Rs. 11,904-14-8 had been received as profits made in dealing in differences and that a sum of Rs. 41,671-11-6 had been lost in such transactions. The statutory report was passed at a general meeting of the company held on the 3rd May, 1937.

The next balance-sheet was made up to the 31st May, 1937. It showed that there was owing to sundry creditors a sum of Rs. 54,967-0-4 and that this amount stood in a suspense account. This balance-sheet was approved of by the directors at a meeting held on the 19th July, 1937. On the 21st February, 1938, the Board considered and passed a balance-sheet disclosing the position of the company as on the 31st October, 1937. By that time the advances by the firm had been reduced to Rs. 5,575-11-0 and the profit and loss account showed a profit of Rs. 17,974-5-4 out of which a dividend of six per cent. was declared. Kasi Viswanathan was present at this meeting of the directors when this balance-sheet was approved, but he was not present at the earlier meetings to which reference has been made. There is, however, no reason to doubt that he knew of what had transpired at the earlier meetings.

The next statement of account, and the last before the company went into liquidation was for the period of seventeen months ending the 31st March, 1939. This disclosed that Rs. 1,33,798-15-6 was due to the firm by the company and that Ramanathan had taken Rs. 1,42,632-6-3 of the company's funds. Until the month of March, 1939 neither the directors nor the auditors had any idea that Ramanathan was helping himself to the company's moneys. This was only discovered when he debited himself with the amounts in his personal account. He had been gambling in shares on his own account and these sums had been devoted to the payment of his own differences. He had, of course, grossly abused the trust placed in him and he had rendered himself liable to prosecution. When his misconduct was brought to light he alleged that he had sufficient securities in Bombay to enable him to repay the whole of the Rs. 1,42,632-6-3 and he undertook to deliver the securities over to the company. His co-directors still believed in him and on the 16th June, 1939, they passed a resolution approving of the balance sheet, which meant that they consented to Ramanathan being treated as having borrowed from the company the Rs. 1,42,632-6-3. Ramanathan went to Bombay with a representative of Kasi Viswanathan to whom he was to hand over the securities. They arrived in Bombay on the 22nd June, 1939, and then Ramanathan absconded. Although criminal proceedings were instituted against him, he has so far evaded arrest.

The short ground on which Bell, J., dismissed the firm's claim was that it was suing for moneys lent and that it had not been proved that the company had received the moneys. He regarded the firm's books as well as the company's books as being altogether unreliable, because they had been written up under the direction of Ramanathan. In his judgment he refers to both sets of accounts as being "admittedly faked". The learned judge must here have been under a misapprehension, at any rate so far as the firm's books were concerned. The firm relied on its own books and has relied on them here. The entries made in them were made on the instructions of Ramanathan, but this does not mean that the moneys were not taken by Ramanathan as loans to the company under the authority given to him by the company to borrow from the firm.

It has not been disputed in this Court that with interest his borrowings amounted at the date of the liquidation to Rs. 1,36,274-1-2, the amount of the appellant's claim. It is, of course, disputed that the company is liable to make good the amount. The learned Judge was also not correct in saying that, except for the admitted amount of Rs. 6,310-7-0, none of the moneys borrowed by Ramanathan had found its way to the company. The Official Liquidator, in the affidavit which he filed in reply to the application of the firm to be allowed to rank as a creditor for Rs. 1,36,274-1-2, admitted that the company had actually received Rs. 31,310-7-0, but he considered that from this sum Rs. 25,000 should be deducted. The firm denies that Rs. 25,000 is deductible and Mr. Rajah Aiyar, on behalf of the firm, has advanced very good reasons in support of this contention. He has also shown that the company actually had the use of a further Rs. 15,000. He maintains that it is not necessary for the firm to recover the full amount claimed to show that the company had the use of the money borrowed by Ramanathan. This broad question will be discussed presently.

The reasons given by the Official Liquidator for his contention that the sum of Rs. 25,000 should be deducted from the Rs. 31,310-7-0 are these. On the 4th August, 1937, Ramanathan, on behalf of the company, drew a cheque in his own favour as the agent of the firm for the sum of Rs. 5,000 and on the 4th August, 1937, he drew a cheque for Rs. 20,000 in the same way. The words "Account of V. K. R. S. T. Firm" appeared under his signature in each case. He did not pay these cheques into the firm. He struck out the words "On account of V. K. R. S. T. Firm" and then cashed the cheques for his own purposes. Subsequently he made entries in the books of the company debiting the amounts to

himself. No part of the moneys ever went back to the firm. In drawing the cheques Ramanathan was acting on behalf of the company, and he embezzled the proceeds before they had reached the firm. The fact that he struck out the words "on account of V. K. R. S. T. Firm" before cashing the cheques is in itself strong indication of the fact that he was not holding the cheques as the agent of the firm. As the proceeds of the cheques were never paid into the firm it cannot be said that they represent a reduction in the company's liability to the firm.

We turn now to the question of the Rs. 15,000. On the 9th November, 1937, Ramanathan, acting under the authority given to him by the company to borrow from the firm, withdrew from it Rs. 39,500 in cash. Two days later he repaid to the firm Rs. 4,500 leaving a balance in his hands of Rs. 35,000. Admittedly Rs. 20,000 of this sum was used for the company. The Rs. 15,000 remaining was lent to one A. T. V. Subramaniam Chettiar, who had an account with the company. The lender was the company, not Ramanathan. The directors had authorised Ramanathan to lend money to A. T. V. Subramaniam. The loan was made on the 9th November, 1937, and A. T. V. Subramanyam's account with the company was immediately debited with the amount. As Ramanathan, in lending the money was acting within the scope of his authority there is no escaping from the conclusion that the money was lent by the company. We hold that the firm is, in any event, entitled to rank as a creditor in the sum of Rs. 46,310-7-0, the total of the three sums of Rs. 6,310-7-0, Rs. 25,000 and Rs. 15,000.

This brings us to the discussion of the question whether the firm is entitled to recover the whole of the Rs. 1,36,274-1-2. As we have already indicated, the directors were not aware of Ramanathan's misappropriations until the month of March, 1939. The learned Judge was under the impression that Kasi Viswanathan knew more than he pretended to know. Kasi Viswanathan did not make a good impression in the witness-box and a perusal of his evidence shows that he fended with the questions put to him. At the same time we cannot believe that he had any inkling of Ramanathan's misconduct until the month of March, 1939. It stands to reason that he would not have allowed his agent to borrow from the firm these large sums of money if he had known that he was utilizing them for the payment of his own gambling transactions. He was, of course, aware that Ramanathan was borrowing money from the firm under the authority given to him by the company and that he was borrowing money from the firm on his own behalf in respect of which there was a separate account. It is the usual practice in Chettiar firms for the agent to send periodically to his principals copies of the accounts and this practice was followed by Ramanathan. Ramanathan had acquired a reputation as a sound businessman, as his election to the Madras Board of the Reserve Bank of India indicates. In the early stages the company had earned a profit. It had appointed a firm of qualified auditors as the auditors of the company. They had drawn up three balance sheets before 1939, and until the month of March, 1939, they had been satisfied that everything was in order. Whether the directors and auditors were justified in regarding gambling in differences as legitimate business of the company is, of course, another matter. Obviously the gambling in differences was most improper and this will be discussed further in the appeals relating to the charges of misfeasance which have been preferred against certain of the directors. But in our opinion it cannot be said that Kasi Viswanathan had any knowledge before the first half of 1939 that Ramanathan had been swindling the company. It is not disputed that if Ramanathan had borrowed money from another firm under the authority conferred upon him by the company the lender would not have been put on inquiry as to the application of the money and that the company would in such circumstances be liable notwithstanding that Ramanathan had

misappropriated the moneys borrowed. Ramanathan's knowledge of the fraud which he was committing was not the knowledge of the firm or company. In *J. C. Haughton and Company v. Northard, Lowe and Wills, Ltd.*¹, Lord Dunedin said:

"The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the director is the knowledge of a director who is himself *particeps criminis*, that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artifice of such infringement? Common sense suggests the answer, but authority is not wanting."

Lord Dunedin then proceeded to quote from the judgment of Vaughan Williams, L.J., in *In re Hampshire Land Co.*², where Vaughan Williams, L.J., said:

"If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."

Therefore the company must be held to be liable unless the fact that Kasi Viswanathan was a managing director of the company makes a difference. In our judgment it does not. He knew nothing of Ramanathan's defalcations until all the money had been borrowed and on the authorities which we have just referred to he cannot be imputed with knowledge, notwithstanding that he was a co-managing director of the company and the head of the firm which employed Ramanathan as its agent.

In order to succeed the firm has to satisfy the Court that the moneys now claimed were handed to Ramanathan as loans to the company under the authority conferred by it on him and we consider that the evidence establishes this. Ramanathan had been given power to borrow from the firm. In the firm's books the withdrawals are entered as loans to the company. In the company's books credit is given to the firm for the amounts. As the money was withdrawn from the firm on behalf of the company under authority given by the company the company must accept liability unless the firm had knowledge that Ramanathan was abusing his authority, which is not the case. For these reasons we direct the Official Liquidator to include the firm in the list of creditors for the sum of Rs. 1,36,274-1-2.

As the firm has succeeded it is entitled to the costs here and below. These will be paid out of the assets of the company. The Official Liquidator will also get his costs out of these assets. We certify for two counsel.

V. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Rongali Pothuraju and others

.. *Appellants**

v.

Kolli Appala Naidu

.. *Respondent.*

* *Promissory note—Indorsement for collection—Indorsee suing members of joint family as sons of the maker—Whether suit will lie—Sons when sued as legal representatives, position unassailable.*

1. (1928) A.C. 1.

2. (1896) 2 Ch. 743.

*S.A. No. 1666 of 1943.

27th April, 1944.

An indorsee for collection of a promissory note will not be entitled under the indorsement to sue the non-executant coparceners or to obtain relief against the joint family properties of the sons of the maker.

A decree can however be passed against the sons brought on record as legal representatives of their father on his death *pendente lite* in respect of the debt, the amount being payable out of any assets or property of the father in their hands.

Appeal against the decree of the District Court of Vizagapatam in A.S. No. 445 of 1943 preferred against the decree of the Court of the District Munsif of Chodavaram in O.S. No. 318 of 1941.

P. Somasundaram for Appellants.

K. Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT.—One of the questions raised in this second appeal preferred by defendants 2 to 5 is whether an indorsee for collection of a promissory note can be given relief against the joint family properties of the sons of the maker also. Both the lower Courts followed the decision of Patanjali Sastri, J., in *Govindaswami Achari v. Kandaswami Achari*¹ where it was held that where an indorsement was for collection and the indorsee occupies the position of an agent of the payee the sons could be made liable in the suit as on the original debt. This decision is in apparent conflict with the Bench decision of Pandrang Row and Abdur Rahman, JJ., in *Viraraghavalu Naidu v. Rajalingam*², which was also a case of a suit by an indorsee for collection and in which it was held by the learned Judges that the plaintiff was not entitled under such an indorsement of the promissory note to sue the non-executant coparceners. Patanjali Sastri, J., referred to this case in his judgment and distinguished it on the ground that there the indorsement was of the "ordinary kind", which are no doubt the words used by the Bench. It is however clear that what they meant to convey by stating that the indorsement before them was of the ordinary kind was that it was not so worded as to transfer the debt itself as will be apparent from this quotation,

"In the present case the indorsement is of the ordinary kind; it is not so worded as to transfer the debt itself nor has any stamp duty been paid on the indorsement".

These remarks follow the quotation from the Full Bench decision in *Maruthamuthu Naicker v. Kadir Badsha Rowther*³, where reference is made to the indorsement being so worded as to transfer the debt as well and the stamp law being complied with. The answer by the Full Bench to the reference was couched in these words:

"The indorsee of a promissory note executed by the managing member of a Joint Hindu family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore in the case of an ordinary indorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law".

It is thus obvious that the ordinary indorsement referred to was not an indorsement of the promissory note for value as distinguished from an indorsement for collection, but an indorsement of the note as distinguished from an assignment of the debt itself. There appears to be no ground therefore for holding that the Bench decision in *Viraraghavalu Naidu v. Rajalingam*² did not apply to a case of a suit by an indorsee for collection.

It is however pointed out by Mr. Kasturi Seshagiri Rao that in this case defendants 2 to 4 who were impleaded originally as sons of the first defendant liable for the amount due under the promissory note were recorded as legal representatives of their father on his death *pendente lite* and that the fifth defendant was also brought on record as another legal representative and that in

1. (1942) 2 M.L.J. 468.

2. (1939) 2 M.L.J. 531.

3. (1938) 1 M.L.J. 378 : I.L.R. (1938) Mad. 568 (F.B.).

their capacity as legal representatives, the sons as well as the widow will be liable. This position of a decree being passed against them as legal representatives of the deceased first defendant for the amount due under the promissory note is unassailable. In place of the decree passed by the lower Courts will be substituted a decree for the same amount with interest at the same rate till date of payment, payable out of any assets or property of the first defendant in the hands of the said legal representatives.

Each party will bear their own costs here and in the Court below. The order as to costs in the first Court will stand.

Leave refused.

Decree varied.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Karingampilly Manakkal Parameswaran Nambudripad's
son Parameswaran Nambudripad *alias* Narayanan Thra-
thar Nambudripad

.. *Appellant**

v.

Subramania Iyer and others.

.. *Respondents.*

Malabar Tenancy Act (XIV of 1930), section 51 (2)—Applicability—Estimation of damages for breach of contract—Section 51 (2) inapplicable where rent is payable in kind.

Section 51 (2) of the Malabar Tenancy Act lays down a commutation rate where rent, michavaram, or renewal fee *has to be fixed*. It could not have been intended to apply to estimating damages for breach of contract and it cannot be applied where the rent is payable in kind. Where the rent *has to be paid* in kind at a particular place and the tenant does not do so, then his landlord would be entitled to the value in money of the produce at the time of the breach.

Appeals against the decrees of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. Nos. 26 of 1942, 64 and 65 of 1942 and 78 of 1942 respectively preferred against the decree of the Court of the District Munsiff of Alathur in O. S. Nos. 254, 255 and 274 of 1941 and 331 of 1941 respectively.

T. V. Muthukrishna Aiyar and S. Venkatachala Sastri for Appellant.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—We are concerned in these appeals only with the estimation of the sum of money due to the appellant, the landlord, on account of the failure of his tenants, the respondents, to pay rent for the years 1115 and 1116 *Makaram*. For the greater part, the rent was payable in paddy, the quantity being 75 paras odd. Both the lower Courts held that the amount due by the tenants to the landlord is the average value of such paddy for 5 years prior to the breach.

The difficulty has arisen over the interpretation of section 51 (2) of the Malabar Tenancy Act. I have been at some pains to understand from a reference to the whole Act what this sub-section could mean; for the context does not help us. The only explanation that seems to fit in with the actual words used in the section is that section 51 (2) lays down a commutation rate where rent, michavaram, or renewal fee *has to be fixed*. It seems clear to me that this sub-section could not have been intended to apply to estimating damages for breach of contract. Section 52 says that

“where the rent is payable in kind, it shall be delivered at the landlord's granary”.

That is more or less what was agreed to by the tenant in his contract (Ex. P-1). By no stretch of imagination can section 51 (2) be applied; because that sub-section only deals with cases where any rent is paid or is to “be paid in money”. We are dealing with a case where the rent is payable in kind and not in money. Where rent has to be paid in kind at a particular place and the tenant does not do so, then his landlord would be entitled to the value in money of the produce at the time of the breach. The landlord is prepared to accept the figures given in the Malabar District Gazette for the years of breach.

* S. A. Nos. 8 to 10 and 131 of 1943.

The appeals are allowed to the extent indicated above and the landlord given decrees for the full appeal amounts in S. As. 8 and 9 and for the appeal amounts less Rs. 1-2-9 and Rs. 16-10-0 in S. As. 10 and 131 respectively. As he has not succeeded entirely the appellant will get half his costs in this Court and in the lower appellate Court (one advocate's fee).

V. S.

Appeals allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

T. S. PL. S. Thinnappa Chettiar and others

*Appellants**

v.

G. Rajagopalan, the Official Liquidator of the Oriental Investment Trust, Limited, Madras (in Liquidation) and others. . . *Respondents.*

Indian Companies Act (VII of 1913), section 281—Managing director indulging in gambling in differences on the stock exchange—Loss to company—Managing director as well as other ordinary directors liable for the loss—Borrowings by the managing director for his own purposes—Fraud—Liability of other directors.

Gambling in differences on the stock exchange is not legitimate business for an investment trust,

Before section 281 of the Indian Companies Act can be invoked, it must be shown that the directors have acted honestly as well as reasonably. Though directors are not trustees in the technical sense they hold a fiduciary position with regard to the assets of the company and they will be guilty of a grave breach of duty in permitting the managing director to dissipate the company's funds by gambling in differences.

Where charges of misfeasance were preferred against the directors of a company and it was found that the managing director had indulged in gambling on the stock exchange and had also borrowed moneys on the company's account which however he had utilised for his own purposes,

Held, that the ordinary directors together with the managing directors were liable for the losses sustained by the company as the result of the gambling transactions, and that, as regards the individual borrowings by the managing director, the other directors as well as the co-managing director cannot be held liable to repay the company, when it was apparent that they were not aware of the borrowings and there was no ground for suspicion that the managing director was not acting properly.

On appeal from the judgment and order of Bell, J., dated 30th June, 1942, and 17th July, 1942, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1087 of 1941 in O. P. No. 157 of 1939.

B. Sitarama Rao and M. Murugappa Chettiar for Appellants.

S. Srinivasaraghavan for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—These three appeals arise out of proceedings instituted under section 235 of the Indian Companies Act by the Official Liquidator of the Oriental Investment Trust, Ltd., which is in the process of being wound up compulsorily under an order of this Court passed on the 21st July, 1939. The company was incorporated on the 9th September, 1936. The first directors were C. Abdul Hakim, P. V. Swaminathan, V. K. R. S. T. Kasi Viswanathan Chettiar, S. Subbaraya Mudaliar, T. R. M. T. S. P. P. L. Palaniappa Chettiar and P. L. V. A. V. Ramanathan Chettiar. C. Abdul Hakim and P. V. Swaminathan died before the liquidation commenced and Kasi Viswanathan after the misfeasance summons had been heard. On the 1st April, 1937, T. S. P. L. S. Thinnappa Chettiar joined the Board. Charges of misfeasance were preferred against Kasi Viswanathan, S. Subbaraya Mudaliar, Palaniappa, Ramanathan and Thinnappa. It was claimed that as the result of their misconduct they were liable jointly and severally in the sum of Rs. 2,77,531-5-9. The learned Judge (Bell, J.) considered that S. Subbaraya Mudaliar had not acted unreasonably and was entitled to the benefit of section 281 of the Indian Companies Act. He found that the Official Liquidator had established a charge of misfeasance against the other respondents and that the loss was to be apportioned as follows : Kasi Viswanathan and Ramanathan were to be jointly and severally liable for

* O. S. As. Nos. 44, 47 and 52 of 1942.

Rs. 1,11,909-10-0, Palaniappa for Rs. 18,651-9-8 and Thinnappa for Rs. 18,651-9-8. Appeal No. 44 of 1942 has been preferred by Thinnappa, Appeal No. 47 of 1942 by the legal representatives of Kasi Viswanathan and Appeal No. 52 by Palaniappa. Ramanathan has not appealed. He absconded on the 22nd June, 1939, after it has been discovered that he had misappropriated large sums belonging to the company.

The principal promoters of the company were Kasi Viswanathan and Ramanathan who were appointed joint managing directors. Kasi Viswanathan was the managing member of a joint Hindu family which carried on a money-lending business under the vilasam of V. K. R. S. T. in the Madras Presidency with its Head Office at Devakottah and a branch at Madras. The firm was of considerable standing. Ramanathan was its agent in Madras. Kasi Viswanathan's brother Narayanan, with whom he was joint, was in charge of the business there but there is no doubt that the management of the Madras branch was largely in the hands of Ramanathan. Ramanathan had acquired a good reputation in the Chettiar community and was its representative on the Madras Board of Directors of the Reserve Bank of India. The authorised capital of the company was Rs. 25,00,000 divided into 25,000 shares of Rs. 100 each. At the time of the liquidation only 6,068 shares had been issued and they were merely paid up to the extent of Rs. 25 per share. This gave a working capital of a little over Rs. 1,50,000. The objects for which the company was formed were those of an investment trust company, but very little investment business was done. Ramanathan was allowed to control the business of the company and at once commenced gambling in differences in shares. He did this with the full knowledge and consent of his brother directors. This matter has been discussed in the judgment which we have just delivered in O. S. A. No. 40 of 1942 and it is unnecessary to repeat all we have said there.

The paid up capital of the company was not sufficient for the transactions which Ramanathan was entering into on behalf of the company and he was authorised by the directors to borrow money from the V. K. R. S. T. Firm. Including interest the company owed to the firm at the date of the winding up the sum of Rs. 1,36,274-1-2. The magnitude of the gambling which was indulged in is to be gathered from the fact that notwithstanding the comparatively small amount of capital available the transactions entered into during the short existence of the company aggregated in value Rs. 1,61,77,443-0-8. The value of the investments held by the company at the time of the liquidation was only Rs. 20,000.

Ramanathan betrayed the trust which was placed in him. He also indulged in gambling in differences on his own behalf and to a large extent he utilised for his own purposes the moneys which he borrowed from the V. K. R. S. T. Firm on behalf of the company. He succeeded in deceiving his brother directors, the auditors of the company and the partners of the firm until the month of March, 1939, when he debited to his personal account with the company the moneys which he had borrowed for the company from the firm. On the 13th June, 1939, the auditors prepared a balance sheet which showed that Ramanathan had taken altogether Rs. 1,42,632-6-3. The Board very complacently agreed to treat this amount as representing loans from the company to Ramanathan. This was done because he said that he possessed securities in Bombay which were sufficient to meet his liability and he undertook to hand them over to the company. Kasi Viswanathan sent his representative with Ramanathan to Bombay to take delivery of the alleged securities, but when they arrived in Bombay Ramanathan absconded. Criminal proceedings were instituted against him and a warrant was issued for his arrest, but this has never been executed. The amount which the Official Liquidator sought to recover in the misfeasance proceedings represented what the company had lost by reason of these gambling transactions and what the company had to pay to the V. K. R. S. T. Firm in respect of Ramanathan's borrowings. O. S. A. No. 40 of 1942 arose out of an action instituted by the firm to recover what Ramanathan had borrowed under the authority given to him by the company. The action was tried by Bell, J., who held that the company was not liable to make

repayment. The firm appealed and we have felt constrained to disagree with the learned Judge's finding. We have held that the company is liable to the firm for the moneys borrowed by Ramanathan.

The main questions which arise in the present appeals are whether the appellants are liable to replace the moneys which Ramanathan lost in the course of the transactions in differences which he entered into on behalf of the company and whether they are liable to make good the money which the company has had to repay to the firm. The learned Judge held that they were liable in respect of the gambling losses, but not in respect of the borrowings because he considered that the company was not liable to repay the firm. If, however, on appeal the company was found liable in respect of the borrowings the appellants' liability would, he said, be correspondingly increased.

We concur entirely with the finding of the learned Judge that the appellants are liable for the loss incurred by the company in permitting Ramanathan to gamble in differences. Contracts of such a nature are unenforceable under the general law and they certainly did not fall within the transactions contemplated by the memorandum of association. The company had, of course, the power to buy shares and to sell them again should it be deemed advisable to do so, but by no stretch of imagination can it be said that gambling in differences on the stock exchange is legitimate business for an investment trust. All that the learned counsel have been able to say on behalf of the appellants is that all the directors *bona fide* believed that this was legitimate business and that therefore the Court should exercise its discretion under section 281, Indian Companies Act. Before section 281 can be invoked it must be shown that the directors have acted reasonably as well as honestly and in permitting Ramanathan to gamble in differences they were not acting reasonably. They cannot even say that they came to know of the nature of those transactions at a late stage. In the statutory report which was prepared on the 10th April, 1937, it was disclosed that the company had received in payment of differences Rs. 11,904-14-8 and had paid out in similar transactions the sum of Rs. 41,671-11-6. While directors are not trustees in the technical sense they hold a fiduciary position with regard to the assets of the company and the appellants were guilty of a grave breach of duty in allowing the company's funds to be dissipated in this way.

It has been pointed out that all the balance sheets, except the last one, which was drawn up as on the 31st March, 1939, were approved of by the company in general meeting. But this makes no difference to the position. There can be no ratification of an illegal contract so far as the company is concerned. See *Ashbury Railway Carriage and Iron Co. v. Riche*¹ and *Flitcroft's case*². In the former case, Lord Cairns said :

"Now I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder had said 'that is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing."

It is admitted that the loss on these transactions amounted to Rs. 1,36,092-3-6. We shall deal later with the matter of the individual liability of the appellants.

The more difficult question is whether the appellants can be called upon to make good to the company the Rs. 1,36,274-1-2 which the company has to repay to the V. K. R. S. T. Firm in respect of Ramanathan's borrowings. That Ramanathan was duly authorised to borrow from the firm is not, and cannot be, disputed. It is now common ground that he used these moneys for the payment of his own gambling transactions. If the directors had been aware of the fact that Ramanathan was using the company's funds in this way and had neglected to interfere

1. 7 H. L. 633.

2. (1882) 21 Ch.D. 519.

they would undoubtedly be liable, but we are satisfied that they did not know until all the money had been borrowed and misappropriated. Therefore the Court has to decide whether their ignorance was due to their own negligence. On behalf of Thinnappa and Palaniappa it is said that they should not be judged by the same standard as Kasi Viswanathan, as he was a managing director. We will first discuss the law so far as it applies to ordinary directors and then consider the position of Kasi Viswanathan as a managing director. In passing it may be mentioned that the assets are sufficient to pay all the creditors and therefore only the shareholders are concerned.

In *In re Denham and Co.*¹, Chitty, J., held that an innocent director cannot be held liable for the fraud practised by his co-directors in issuing to the shareholders false reports and balance sheets, provided that the books and accounts of the company have been kept and audited by duly appointed and responsible officers and he has no ground for suspecting fraud. In that case, Chitty, J., pointed out that no one was bound to presume a fraud and that the directors were not bound to examine entries in the company's books. The opinion that directors are not bound to examine entries in the company's books had previously been expressed by Jessel, M.R., in *Hallmark's case*² and Lord Davey in *Dovey v. Cory*³ agreed with what was said in these cases. In the present case, it cannot be said that either Thinnappa or Palaniappa had any ground for suspecting that Ramanathan was acting fraudulently. The company had appointed a firm of qualified auditors and until Ramanathan had completed his misappropriations the auditors themselves were entirely in the dark. The balance sheets of the 31st May, 1937 and 31st October, 1937, which were the last to be drawn up until the fraud had been discovered, had been passed by the auditors. When the statutory report was drawn up on the 3rd April, 1937, there was owing by the company to the firm Rs. 1,06,000. The balance sheet of the 31st May, 1937, showed that the amount owing to the creditors had been reduced to Rs. 54,967-0-4, and that of the 31st October, 1937, showed that there was only due to the V. K. R. S. T. Firm Rs. 5,575-11-0. Therefore it may safely be taken that the directors had no ground for suspicion. They acted improperly in allowing Ramanathan to gamble on the stock exchange and for this we hold them liable, but they were not put on inquiry whether Ramanathan was borrowing money from the firm on behalf of the company and utilising it for himself. As Palaniappa and Thinnappa were entitled to rely on their auditors and had no reason for suspecting Ramanathan, they cannot be held liable for sums which Ramanathan took from the firm.

Does Kasi Viswanathan stand in a different position? It is true that he was a joint managing director with Ramanathan, but he cannot be imputed with knowledge of Ramanathan's fraud simply because he was a co-managing director. The principles laid down by the House of Lords in *J. C. Haughton and Co. v. Northard, Lowe and Wills, Ltd.*⁴ which we have discussed in our judgment in *V. K. R. S. T. Firm v. The Official Investment Trust, Ltd.* (O. S. A. No. 40 of 1942) apply equally here. The acceptance of the office of a co-managing director undoubtedly involved special responsibilities, but on the 10th April, 1937, the Board of Directors passed a resolution which put into Ramanathan's hands, and his hands alone, the conduct of the company's business and by another resolution authorised him to borrow from the firm. Kasi Viswanathan was not present at this meeting, but it may be taken that he had knowledge of what had been decided on. Moreover, Kasi Viswanathan was living near Tinnevely, some 400 miles away from Madras, and it could never have been intended that he should take an active part in the management of the company. Even if it were otherwise, the fact remains that with common assent everything was left to Ramanathan who deceived Kasi Viswanathan as much as he deceived the other directors. A managing director, like an ordinary director, is entitled to place reliance on the company's auditors, unless there exists ground for suspicion which was not the case here. Had Kasi Viswanathan examined the

1. (1883) 25 Ch.D. 752.
2. (1878) 9 Ch.D. 329.

3. (1901) A.C. 477.
4. (1928) A.C. 1.

books before March, 1939, he would not have found any indication of Ramanathan's misappropriations, and he was equally justified in trusting Ramanathan. For these reasons we hold that Kasi Viswanathan is in no worse position than his co-directors. It may be added that the company's accountant was not called upon to give evidence. He was present in Court at the trial and was assisting the Official Liquidator in instructing counsel. Had there been any ground for suspecting Ramanathan surely the company's accountant would have known it.

The result is that the appellants together with Ramanathan must be held liable for the loss sustained by the company as the result of the gambling in differences, but not for the loss caused by Ramanathan's misappropriations. Kasi Viswanathan's legal representative says that the learned Judge erred in differentiating between the appellants, as they are jointly and severally liable to the company for the loss incurred. We consider that this argument is sound, except that Thinnappa cannot be made liable for any loss suffered before he joined the board. This is not a case in which the appellants can invoke section 281 Indian Companies Act. It is common ground that the losses upto the date when Thinnappa joined the Board amounted to Rs. 31,111-7-6. The total loss on transactions in differences was Rs. 1,36,092-3-6 and Kasi Viswanathan, Ramanathan and Palaniappa must be held jointly and severally liable in this sum. The liability of Thinnappa will be Rs. 1,04,980-12-0 (Rs. 1,36,092-3-6 less Rs. 31,111-7-6). Ramanathan will, of course, be liable for the Rs. 1,41,439-2-3 as well. Interest at the Court rate will run from the 17th July, 1942, the date of the final order of the learned Judge. That order will be amended in accordance with this judgment. We do not propose to decide whether in law there is any right of contribution between the directors *inter se*. This question must be left to be decided in other proceedings should the occasion arise. At the moment the Court is only concerned with the loss suffered by the company by reason of the misfeasance of the appellants as directors, and so far as the company is concerned they are all liable to make good the loss on the gambling, subject to the deduction of Rs. 31,111-7-6 in the case of Thinnappa. The decision of the learned Judge that S. Subbaraya Mudaliar should be exonerated has not been challenged.

The Official Liquidator will receive costs from the appellants on the sum of Rs. 1,36,092-3-6. He will pay to the appellants out of the assets of the company costs on Rs. 1,41,439-2-3 (one set). He will have his own costs out of the estate. We certify for two counsel.

K. C.

Order varied.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Ekollu Subbarami Reddi

.. Appellant*

v.

Ekollu Chenchuraghava Reddi and others

.. Respondents.

Hindu Law—Grandfather's power to effect division in status between minor grandchildren.

A Hindu grandfather has the same power to effect a division in status among his minor grandchildren as the father has with regard to his own minor children.

Aiyavier v. Subramania Iyer, (1917) 32 M.L.J. 439, followed.

Where it was found, that the women in the family could not live together amicably and it was clearly in the interests of their children, who were minors, that the latter should become divided and live separately,

Held, that the action of the grandfather of the minors in effecting a division in status between the minor grandchildren born of these women was quite valid.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A. S. No. 29 of 1940 (A. S. No. 28 of 1940, District Court) preferred against the decree of the Court of the District Munsiff of Kavali in O. S. No. 285 of 1937.

P. V. Rajamannar and K. Subba Rao for Appellant.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT.—The facts found by the lower Courts are that D. W. 1 had two sons, Chenchuraghava Reddi and Subba Reddi. Chenchuraghava Reddi died in 1917, leaving three sons, the plaintiff (his son by the first wife), Subba Reddi (his elder son by the second wife), and the first defendant. Because the wife of D. W. 1, the wife of Subba Reddi, and the third defendant (the surviving wife of Chenchuraghava Reddi) could not get on together, it became necessary to divide the property so that these ladies should not have any further cause for quarrel. The result was that D. W. 1, the grandfather, took a small area of land for himself and divided the rest among his descendants according to the rules of Hindu law. Subba Reddi was given a half; the plaintiff, who was represented at the panchayat by his maternal grandfather, was given one-third of the remaining half; and the sons of the third defendant were given the remaining one-third. This partition was effected by D. W. 1; and the question that arises in this appeal is whether that partition is binding on the plaintiff, *i.e.*, did D. W. 1 have the power to effect a division in status between the plaintiff and his two half brothers, Subba Reddi and the first defendant? Both the Courts below held that he had such a power. They were of opinion that he could do so because he was the grandfather of these three children and because it was a family settlement necessitated by quarrels among the women of the family.

That a father can effect a partition of family property so as to effect a division in status between his minor sons is not disputed. One of the questions for decision here is whether a grandfather can do the same amongst his grandsons. Mayne and Raghavachariar, in their works on Hindu law, suggest they can; and the authority they quote is *Aiyavier v. Subramania Iyer*¹. Unfortunately, the learned Judges in that case did not have to decide this question. They were concerned with the question whether a grandfather can divide himself off from his grandsons and then give away the share that falls to him in partition. There was no dispute between the grandchildren *inter se*; and the question whether they were divided or undivided seems not to have arisen. However, it does seem from the reasoning of the learned Judges that they thought that a Hindu grandfather had the same powers to effect a division amongst his minor grandchildren as a father has with regard to his minor children. While I am perhaps not strictly bound to follow that decision in this case, I feel that I should do so in the absence of any authority to the contrary.

On the facts of this case the partition may be regarded in a somewhat different light. It does not appear that D. W. 1 took the matter entirely into his own hands and divided the property without any representation by the parties concerned in the partition. His own son, Subba Reddi, was a major; and there can be no doubt about his right to divide himself off from the family and take his half share. It was also necessary for the plaintiff's share to be separated from the shares of his half brothers, because the plaintiff had been living with his maternal uncle, whereas his half brothers were living with their mother. In *Akkanna v. Rangaraju*², Jackson, J., after considering at considerable length all the cases that had any bearing on this question, came to the conclusion that the guardian of a minor can effect a division in status of her minor son. In referring to the line of cases which have held that the mere filing of a suit on behalf of a minor would not effect a severance in status unless the Court subsequently found that a partition would be for the benefit of the minor, he said that where there is a suit for partition on behalf of a minor, the Court stands in the position of a guardian and is bound to exercise its discretion for the benefit of the minor. But if the guardian of a minor comes to Court and says that she has already declared a severance in status of her minor son, the Court has no discretion in the matter and is bound to give the minor his share of the property. He points out that in *Soundararajan v. Arunachalam Chetti*³ a decision of a Full Bench of this Court, the learned Judges held that the severance

1. (1917) 32 M.L.J. 439.
2. A.I.R. 1930 Mad. 486.

3. (1915) 29 M.L.J. 793; I.L.R. 39 Mad. 159.

in status was effected from the date of the filing of the suit, though the plaintiff was then a minor; and Jackson, J., concluded that that was clearly because the appeal had proceeded on the basis that the declaration of the minor's guardian at the time of the filing of the suit had effected a division in status. It does not seem reasonable to suppose that where guardians of minors find it impracticable to manage the affairs of the minors without partitioning the property, they are helpless to bring about a partition in the interests of the minors without recourse to the Court. In the case now under consideration, there were three women in the house who found it impossible to live together; and so it was clearly in the interests of the minors that they should become divided and live separately.

I therefore think that the lower Courts were right. The appeal is dismissed with costs.

K.C.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Valiakath Kunhi Seethi Koya Thangal

*Appellant**

v.

Kizhekkithathi Kovilakath Ravi Varma *alias* Veera Varma Raja

Avergal and others

Respondents.

Civil Procedure Code (V of 1908), section 24—High Court remanding suit expressly to District Court—District Court transferring the same to Sub-Court—District Court has jurisdiction to transfer.

A suit was remanded by the High Court expressly to the District Court for disposal because the Sub-Court which would have had jurisdiction in respect of the suit had been abolished; but by the time the case went back the Sub-Court was re-established and therefore the District Court transferred the suit to the Sub-Court itself. On the question whether the District Court could so transfer the suit to the Sub-Court,

Held, that under section 24 of the Civil Procedure Code the District Court had wide powers in the matter of transfer of suits, appeals, etc., and the transfer in the present case was competent.

Singamusetti Venkatiah v. Bopala Chirramma, 1914 M.W.N. 317, followed.

Appeal against the decree of the District Court of North Malabar in A. S. No. 11 of 1942 preferred against the decree of the Court of the Subordinate Judge of Tellicherry in O. S. No. 6 of 1941 (O. S. No. 7 of 1939, District Court).

P. Govinda Menon and C. K. Viswanatha Ayyar for Appellant.

K. Kuttikrishna Menon for Respondents.

The Court delivered the following

JUDGMENT.—The main question raised in this second appeal is whether the Subordinate Judge of Tellicherry was competent to hear the suit. The suit came up in second appeal to this Court in S. A. No. 870 of 1935 both the lower Courts having dismissed it on the ground that the plaintiff was estopped from denying the defendant's title. This Court held that there was no estoppel precluding the plaintiff from maintaining the suit and from enforcing his claim as against the defendant and remanded the suit to the District Court for disposal. It is said that it was brought to the notice of this Court that the Sub-Court was no longer functioning and that is given as the reason why the suit was remanded to the District Court of North Malabar for disposal. After this Court remanded the suit, a Sub-Court was established at Tellicherry and the District Judge transferred the suit to that Court. The Subordinate Judge heard the suit and dismissed it. An appeal was taken to the District Judge and he dismissed the appeal. Hence this second appeal.

The point urged by Mr. Govinda Menon, the learned advocate for the appellant is that as the High Court remanded the suit expressly to the District Court for disposal that Court had no jurisdiction to transfer the suit to the Subordinate Judge's Court and it is conceded that this objection was not taken either before the Subordinate Judge at the trial or before the District Judge when the appeal was presented

* S. A. No. 668 of 1943.

to him. Nor was it urged before the District Judge at the hearing of the appeal. It is taken for the first time in this Court. Two answers are suggested by the respondents. One is that under section 24 of the Civil Procedure Code of 1908, the District Court is given very wide powers to transfer any suit, appeal or proceeding at any stage. It may withdraw a suit and then either try it or transfer the same to any Court subordinate to it or retransfer the same for trial to the very Court from which it was withdrawn. There seems to be great force in this argument that the powers of the District Court are very wide. The decision of Sadasiva Ayyar and Spencer, JJ., in *Singamusetti Venkatiah v. Bopala Chirranna*,¹ has been brought to my notice by learned counsel for the respondents. There an appeal was remanded by the High Court to the District Court and the District Court transferred the same to the Subordinate Judge and the Subordinate Judge heard the appeal. No objection was taken either at the time of the transfer by the District Court or at the time when the appeal was heard by the Subordinate Judge. In second appeal, it was urged for the first time that the Subordinate Judge's Court had no jurisdiction to hear the appeal as it had been remanded by the High Court to the District Court. It will be seen that the objection is the same in the present case except that in the case dealt with by the learned Judges it was a case of an appeal whereas in this case it was a suit that was remanded to the District Court. The learned Judges held that the District Court had ample power to transfer the appeal to the Subordinate Judge's Court under section 24 of the Civil Procedure Code. This is a decision directly in point. Mr. Govinda Menon, the learned advocate for the appellant draws my attention to a decision of Krishnan, J., in *Uthuman Ammal v. Naina Mohamed Rowther*². There a suit was tried by the District Munsiff's Court of Madura Taluk. It came up to the High Court and the High Court remanded the suit. While remanding the suit to the Court of first instance it was stated that as that Court had been abolished the suit was remanded for trial by the Madura Town Court. By the time, the suit went back, the Madura Taluk Munsiff's Court was established. The suit was tried by that Munsiff and the objection was taken before the High Court that that Court had no jurisdiction because the suit was specifically remanded to the Madura Town Court. The learned Judge held that as the terms of the remand order of the High Court were expressly to the effect that it was to be tried by the Madura Town Court the Taluk Court had no jurisdiction to hear the suit. This decision does not apply to the facts of the present case because here it is a suit remanded to the District Court and the District Court has the power under section 24 to transfer a suit or appeal to any other Court subordinate thereto. There was no order of the District Judge under section 24 in the case which came up before Krishnan, J. I hold therefore that the decision of the Bench in *Singamusetti Venkatiah v. Bopala Chirranna*¹, is directly applicable. On the merits I see no reason to interfere.

• The second appeal is dismissed with costs.

• No leave. •

K.C.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Abdul Sattar Ismail and others

.. *Appellants**

v.

Abdul Hamid Sait and others • •

.. *Respondents.*

Mahomedan Law—Cutchi Memons—Execution of wills—Rules of Hindu law applicable—Provision for members of family—Gift over of properties to charitable objects if family should become extinct—Validity—Wakf—Gift of residue of movables—Religious and charitable objects—Validity of dedication—Musalman Wakf Validating Act, 1913—Rules governing wakf.

1. 1914 M.W.N. 317.

* O.S. A. No. 35 of 1942.

2. (1922) 44 M.L.J. 238.

7th March, 1944.

Cutchi Memons are governed by Hindu law in matters of succession and inheritance, and as the law of wills is part of the law of inheritance they have the same right as Hindus of disposing of their personal property by will unless there is a custom to the contrary. In such a case the will should be construed according to rules of Hindu law except in so far as it operates to create a wakf.

A Cutchi Memon executed a will whereby after making bequests of movable properties to various members of his family and provision for the maintenance and education of his grandchildren he provided as follows :— " With the object of attaining nearness to God and reward in the world to come, I am desirous of making wakf of all the residue of my estate not hereinbefore specifically disposed of for the education, maintenance, marriage, support and other expenses of all grandchildren now born or to be born, and their descendants both male and female from generation to generation in proportion to their respective shares in my estate if the devolution thereof had been governed by the Mahammadan law applicable to the Hanafi sect in case of intestacy. In the event of the descendants both male and female of my said grandchildren becoming extinct the wakf trustees for the time being shall hold the wakf estate in trust for the following charities in such proportion as my wakf trustees shall think fit ; mosques and provision to conduct worship herein ; distribution of alms to poor persons and assistance to the poor to enable them to perform the pilgrimage to Mecca ; celebrating the death anniversaries of myself and members of my family ; reading the Koran in public places and at private houses ; and maintenance of my poor relations and dependants."

Held, that it could not be said that there was uncertainty with regard to the property dedicated or that the dedication was subject to a contingency and that the dedication was not rendered invalid on those grounds. And the fact that the properties dedicated included part of the residue of the testator's movables did not affect its validity in view of the provisions of the Musalman Wakf Validating Act.

Held also, that all the objects for which the trustees were directed to devote the income in the event of the family becoming extinct were valid objects of wakf. The observance of the anniversaries of the deaths of the testator and members of the family involving feeding of the poor constitutes a valid object of wakf. Similarly the reading of the Koran in public and private places is not only religious and pious but is also charitable as it is for the benefit of all Musalmans.

Held further, that even if some of the objects were invalid the wakf was not rendered invalid as the *cy-pres* doctrine could be applied in carrying out the directions in the will.

On appeal from the decree dated 6th April, 1942, and judgment dated 19th December, 1941, etc., in C. S. No. 280 of 1939, of Somayya, J.

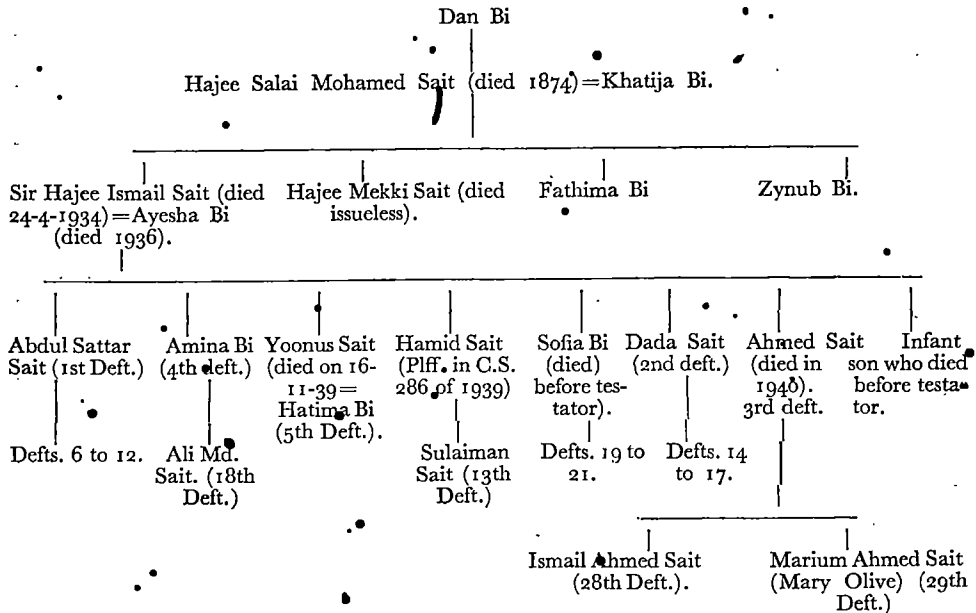
K. Rajah Aiyar, D. Narasaraju, P. P. Selvarajan and T. A. Krishnamachari for Appellants.

B. Sitarama Rao, S. Krishnamachari, J. Lakshmyya, P. K. Janakirao, K. S. Rajagopala Aiyangar, S. Govind Swaminathan, D. R. Krishna Rao, S. Azimuddin, M. Subramania Sarma, P. G. Menon, C. Veeraraghavalu Chetty, S. Krishnamurthi, T. T. Srinivasan, A. Ramaswami and A. Sundaresa Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal raises important questions of law, in the first place with regard to the testamentary capacity of Cutchi Memons before the passing of the Cutchi Memons Act, 1938, and in the second place with regard to the validity of a wakf which a Cutchi Memon by his will directed should be endowed by the property forming the residue of his estate.

The appeal arises out of two suits filed on the original side of this Court for the administration of the estate of Hajee Sir Ismail Sait, a wealthy Mussalman of the Hanafi sect and a member of the Cutchi Memon community, who died in Bangalore on the 24th April, 1934. He had eight children, seven of whom survived him, as did their mother. He left a will and a codicil thereto, both of which have been admitted to probate by this Court. On the 6th December, 1939, two of the testator's grandsons, sons of his eldest son, filed C. S. No. 280 of 1939 for the administration of the estate in accordance with the testamentary directions given by their grandfather. On the 16th December, 1939, his third son filed C. S. No. 286 of 1939 for the administration of the estate on the basis that the will was invalid. The two suits were tried together by Somayya, J., and this appeal is from his judgment. The relationship between the parties will be gathered from the following genealogical tree.



The descriptions are those of the parties to the second suit, all of whom were all the parties to the first suit.

Admittedly the properties left by the testator had been acquired by him as the result of his own exertions. His will is dated the 19th March, 1934. He made specific bequests of immovable property to various religious, pious and charitable institutions and a sum not exceeding Rs. 25,000 for the erection on the lands of the Jama Musjid in the old Poor House Road, Bangalore, of shops and business premises, which were to constitute an additional endowment of this mosque. After making bequests of movable property to various members of his family and provisions for the maintenance and education of his grandchildren, he gave these directions (Clause 15) :

"Whereas with the object of attaining nearness to God and reward in the world to come I am desirous of making wakf of all the rest, residue and remainder of my estate in the hands of my trustees not hereinbefore or by any codicil specifically disposed of or dealt with and after my trustees shall have set apart thereout sufficient to provide for the payments hereinbefore directed to be made such wakf is hereinafter called the wakf estate and shall for all time after my death be known as the 'wakf estate of Hajee Sir Ismail Sait of Bangalore' for the education, maintenance, marriage, support and other expenses of all my grandchildren now born or to be born and their descendants both male and female from generation to generation in proportion to their respective shares in my estate if the devolution thereof had been governed by the Mohammedan law applicable to the Hanafi sect in case of intestacy."

In clause 21 of the will the testator made provision for the application of the income of the wakf estate in the event of his family becoming extinct. The clause reads as follows :

"In the event of the descendants both male and female of my said grandchildren becoming extinct the wakf trustees for the time being shall hold the wakf estate and the investments for the time being representing the same in trust for the following charities in such proportion as my wakf trustees shall think fit :

- (1) Mosques and provision for imams to conduct worship therein ;
- (2) Distribution of alms to poor persons and assistance to the poor to enable them to perform the pilgrimage to Mecca.
- (3) Celebrating the death anniversaries of myself and of the members of my family.
- (4) Reading the Koran in public places and also at private houses ;
- (5) Maintenance of my poor relations and dependants."

The testator appointed his second son Yoonus and two others who were not members of the family as his executors and his eldest son Abdul Sattar, Yoonus and one Abdul Sattar Abba of Mysore to be the first trustees and muttavalis of the wakf estate. Only Yoonus proved the will. The codicil is not of importance. It is common ground that it relates only to the school fees of a deceased grandson and that it stands or falls with the will.

Cutchi Memons are the descendants of Hindus who were forcibly converted to Mohammadanism some 400 years ago. In spite of their conversion they retained the Hindu law of succession and inheritance and, generally speaking, their descendants continued to adopt as their personal law, the Hindu law in such matters until the Cutchi Memons Act of 1938 was passed. The plaintiff averred that the family had elected to be governed by the Mohammadan law in matters of succession and inheritance and therefore the testator was unable to dispose of more than one-third of his estate by will. The plaintiff also challenged certain of the legacies and the validity of the wakf. His case in all respects was strongly opposed by the first defendant and his sons. They maintained that the testator had full disposing power and that the will was valid in its entirety. The plaintiff is supported by the second, third, fourth, fifth, 28th and 29th defendants. All the other members of the family support in the main the first defendant and his sons. The two questions of importance are whether the testator had power to dispose of the whole of the estate by will or whether his power was limited to the Mohammadan rule of one-third and whether he created a valid wakf in respect of the residue of his estate. There were numerous other questions raised below, but in the view which we take of the case it will not be necessary to discuss the other questions, save one which is raised in a memorandum of cross-objections filed by the fifth defendant.

The testator's father migrated from Cutch to Bangalore in 1870 and ever since the family has resided in Bangalore. The learned Judge rejected the plaintiff's contention that the family had elected to be governed by Mohammadan law and held that it had retained the personal law which the testator's father brought with him from Cutch in 1870. This finding is not challenged. Indeed, it could not be in view of the testator's statement in his will that he had not made a declaration under the Cutchi Memons Act, 1920. That Act permitted a Cutchi Memon to make a declaration that he desired to obtain the benefit of the Act and thereafter the declarant and all his minor children and their descendants were to be governed in matters of succession and inheritance by the Mohammadan law. The learned Judge went on however, to hold that, notwithstanding that the Cutchi Memons retained the Hindu law of succession and inheritance, the testator was governed by the Mohammadan law with regard to testamentary power. He considered that, as at the time of the conversion of Cutchi Memons the Hindu law did not recognise wills, they presumably adopted the Mohammadan law in this respect. The appellants are the first defendant and his sons. They maintain that the learned Judge erred in holding that the testator's testamentary power was restricted to one-third of his estate. With regard to the wakf, Somayya, J., held that it was invalid, but that its endowments must be limited to one-third of the residue of the immovable property. He considered that there could be no dedication of movable property. The plaintiff has filed a memorandum of cross-objections in which he says that the learned Judge should have held the wakf to be valid in its entirety.

It may be mentioned that since the passing of the Cutchi Memons Act, 1938, all Cutchi Memons are in matters of succession and inheritance governed by the Mohammadan law. The Court can, however, only have regard to what was the personal law of the testator at the time of his death, and that law was undoubtedly the law of Cutchi Memons in Cutch in 1870. See *Abdurahim Haji Ismail Mithu v. Halimbai*¹ and *Mohammed Ibrahim Rowther v. Shaik Ibrahim Rowther*². There have been several cases decided by the Bombay High Court with regard to the testamentary power of Cutchi Memons and these we shall examine presently. Before doing so, however, we will refer to the will making power of Hindus generally, as this has an important bearing on the case.

The origin of testamentary power among the Hindus is discussed at length in the 9th edition of Mayne. There is reference to this matter in the latest edition of the work, but the 9th edition is more helpful. In the 9th edition at page 566 it is pointed out that, while the idea of a will is wholly unknown to Hindu law and

1. (1915) 30 M.L.J. 227; L.R. 43 I.A. 35 (P.C.) 2. (1922) 43 M.L.J. 69; L.R. 49 I.A. 119; I.L.R. 45 Mad. 308 at 314 (P.C.).

the native languages do not even possess a word to express the idea, yet there can be no doubt that from the earliest period of our acquaintance with India we find traces of a struggling towards the testamentary power, often checked, but constantly renewed. The right of a Hindu to make a will in respect of his self-acquired property was recognised first in Bengal, then in Bombay and then in Madras. It can safely be taken that long before the testator's father left Cutch the right of a Hindu to make a will of his own property was recognised, throughout Hindustan. Consequently, it is said by the appellants, and with reason, that testamentary power had before 1870 become embodied in the Hindu law and all those who were governed by the Hindu law in matters of succession and inheritance had the right of exercising the power. The law of wills is part of the law of inheritance as the Bombay High Court pointed out in *Mancharji Pestanji v. Narayan Lakshmanji*¹.

As this case in this connection is mainly concerned with the position of the Bombay side of India the following extract from the judgment of Westropp, J., in *Narain Jagjivan v. Narsandas Harkisandas*², delivered in 1866 is relevant :

"In the supreme Court the wills of Hindus have been always recognised, and also in the High Court, at the Original Side, whatever questions there may formerly have been as to the right of a Hindu to make a will relating to his property in the mofussil, or as to the recognition of wills by the Hindu Law, there can be no doubt that testamentary writings are, as returns, made within the last few years from the Zillahs show, made in all parts of the mofussil of this Presidency; but, as might have been expected, much more frequently in some districts than in some others, and this Court at its Appellate Side has, on several occasions, recognised and acted upon such documents. That Hindus may make wills and such wills may be admitted to proof, is contemplated by sections 1 and 13 of Act XXVII of 1860, an enactment which more especially concerns the mofussil. The testamentary power of Hindus is by Lord Kingsdown in 9 Moo. I.A. 121 and by Knight Bruce, L.J., *Ibid.*, page 135, treated as completely established. It is, therefore, now too late to deny to Hindus in the mofussil of this Presidency the right to make wills, as the District Judge has done in the present case."

The Supreme Court of Bombay was established in the year 1823 and the Bombay High Court in 1865.

In *Besant Singh v. Brij Rajsaran Singh*³, a case where the question was raised whether the customary law of the Delhi District governed the Jats of that district, the Privy Council said that such customary law found to exist in 1880 and 1910 must be taken to have the ordinary attribute of a custom that it was ancient, and, unless the contrary was proved, it must be assumed to have existed prior to 1858, when one Kūshal Singh left the Delhi district.

If the right of a Hindu to make a will is not inherent in his personal law, it must be taken to be a customary right, and, therefore, a right which existed long before 1870 when the testator's father left Cutch, unless the contrary is proved; and there has been no attempt to do this here.

Cutch is a Native State under the political superintendence of the Government of Bombay, and Cutchi Memons move freely between Cutch and the City of Bombay. Many of them reside and trade in Bombay. In 1885, the Bombay High Court in *Mohammed Siddiq v. Haji Ahmed*⁴, had to consider the question whether a Cutchi Memon could dispose of ancestral property by will, and it was held that he could not. The will of a Cutchi Memon whose father had carried on business in Cutch and Bombay was admitted to probate. In the judgment in that case, Scott, J., said that Cutchi Memons appeared as litigants in 1847, but for over 30 years, the community had wisely abstained from litigation. The judgment then proceeds :

"But although the reports contain no decisions between 1847 and 1881 concerning Cutchi Memons, there have been many concerning a similar Mohammadan sect, the Khojas, concerning whom in *Shivji Hasam v. Datu Movaji Khojar*,⁵ the late Chief Justice and Mr. Justice West held it to be settled law that, 'in the absence of settled evidence to the contrary, the Hindu Law is applicable to matters relating to property, inheritance and succession among Khoja Mohammedans.' As regards the Cutchi Memons themselves, there is considerable evidence of another character, which shows it to have been their practice also to follow Hindu Law, as their own law of inheritance. In almost every application for letters of administration, and in the carrying out of almost every will made by the community during that time, the Hindu Law has been followed. As early as 1845,

1. (1863) 1 Bom.H.C.R. 77.

2. (1866) 3 Bom.H.C.R. (App.C.J.) 6.

3. (1935) 69 M.L.J. 225 : L.R. 62 I.A. 180 :

I.L.R. 57 All. 494 (P.C.).

4. (1885) I.L.R. 10 Bom. 1.

5. 12 Bom.H.C.R. 231, A.C.J.

this very family, whose members are now litigating, divided the family property, amounting to nearly three lakhs of rupees, according to Hindu rules. In a series of exhibits put in by Mr. Starling, Hindu law is evidently considered the governing law of the sect. Thus out of sixty Cutchi Memon wills on the list furnished by the Ecclesiastical Registrar, in only one, (No. 38) the principles of Mohammedan law seem to have guided the Registrar."

In 1915, in the *Advocate-General of Bombay v. Jimbabai*¹, Beaman, J., held that Cutchi Memons had acquired by custom the right of disposing of the whole of their property by will, but he considered that a Cutchi Memon's will should be construed by reference to Mohammedan law. The latter part of this opinion has not found acceptance in later cases and it must be taken that the Bombay High Court now interprets wills of Cutchi Memons in accordance with the Hindu law. In *Abdul Sakur v. Abubakkar*², Mirza, J., strongly criticised the judgment of Beaman, J., and refused to follow it. He was firmly of the opinion that a Cutchi Memon's will should be construed according to Hindu law. The question was raised before a Bench of the Bombay High Court in 1935 in *Adambhai v. Allarakhia*³, and the opinion of Mirza, J., was accepted. The question was also raised in this Court in *Siddique Haji Abboo Bucker Sait v. Ebrahim Haji Abboo Bucker Sait*⁴, where after an exhaustive examination of the authorities, Kumaraswami Sastri, J., held that Cutchi Memons were governed by the Hindu law. They could, he found, dispose of self-acquired property by will, but not joint family property.

Mr. Sitarama Rao on behalf of the plaintiff says that while the right of Cutchi Memons residing in Bombay to make wills has been recognised, it does not follow that Cutchi Memons in Cutch had this right in 1870, and that there has been no attempt in this case to prove that was the position in Cutch in 1870. It hardly lies in the plaintiff's mouth to say this. It was no part of his case as set out in the plaint. There he pleaded that the testator was governed by Mohammedan law and not by Hindu law and the parties went to trial on this basis. After the evidence has been closed, Mr. Sitarama Rao was briefed to address the Court on the case. He had not appeared in it before then. He was allowed by the learned Judge to take the point, but the correctness of the learned Judge's decision in this respect is certainly open to question as it had never been suggested at any previous stage that there was a difference in the law governing Cutchi Memons living in Cutch and Cutchi Memons living in Bombay. We are not prepared to accept the argument. Cutch is only some 250 miles from the City of Bombay and as we have already pointed out, it is under the political superintendence of the Governor of Bombay and free movement takes place between the two places.

It is now firmly established that Cutchi Memons are governed by Hindu law in matters of succession and inheritance and the right of a Hindu to dispose of his self-acquired property by will is equally firmly established throughout India. As Cutchi Memons are governed by the Hindu law in matters of inheritance, and as the law of wills is part of the law of inheritance, they must be held to have the same right as Hindus of disposing of their personal property by will unless there is a custom to the contrary, which has not been proved. In fact there has been no attempt to prove such a custom. On the other hand, the Bombay High Court has expressly recognised the right of Cutchi Memons to make wills, and this Court has done the same.

For the reasons indicated, we hold that the testator is governed by the Hindu law of Inheritance and succession; that the testator had full testamentary power over the property of which he died possessed, and that the will must be construed according to Hindu law, except in so far as it operates to create a wakf.

Learned counsel in the course of the arguments agreed that if the Court should hold that the testator had full testamentary power, the only substantial question left would be with regard to the validity of the wakf. The plaintiff says that the wakf is invalid for these reasons: (1) There was no immediate vesting of the wakf property in the wakf trustees; (2) as the endowment was to consist of the residue

1. (1915) I.L.R. 41 Bom. 181.

2. (1929) I.L.R. 54 Bom. 358.

3. (1935) 37 Bom.L.R. 686.

4. (1920) 31 M.L.T. 183.

of the estate, there was uncertainty with regard to the property; (3) the Mohammadan law does not recognise a dedication of movable property; and part of the residue must consist of movables; and (4) the celebration of the death anniversaries of the testator and of the members of his family, the reading of the Koran in public places and private houses, and the maintenance of the testator's poor relations and dependants, are not recognised by Mohammadan law as valid objects of wakf.

Although the learned Judge held in favour of the validity of the wakf in so far as the endowment consisted of immovable properties which were included in the residue of the estate he did not consider that the wakf trustees would be justified in devoting any of the income for the advancement of the testator's descendants or for marriage expenses. It has been agreed that if this Court holds that the wakf is otherwise valid, it will be lawful for the trustees to make advancements out of the income should they think fit and to make payments on account of marriage expenses. It is conceded by the contesting defendants that as the testator's testamentary powers were those of a Hindu, he could not by his will have created a wakf had the Mussalman Wakf Validating Act, 1913, not been passed.

In a number of cases the Privy Council had held that a Mohammadan could not make a wakf of his property when the primary object of the dedication was to benefit his descendants. Mohammadan lawyers did not accept the correctness of this ruling and as their opinion conformed to the wishes of the Mohammadan community the Validating Act was passed in order to allow a Mohammadan to create a wakf for the benefit of his descendants. Section 2 of the Act defines "wakf" and "Hanafi Mussalman." It says that "wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable and that "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi School of Mussalman law. Section 3 reads as follows:

"It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants; and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

Section 4 says that no such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

We agree with the learned Judge that the wakf is not invalid because the will does not immediately vest the residue of the estate in the wakf trustees, and that there is no uncertainty with regard to the property dedicated. Clause 17 of the will directs that the executors, whom the testator described as his trustees, shall transfer to the wakf trustees the residue of his estate as soon as they can conveniently do so. Having ascertained the debts due by the estate it would be a very simple matter for the executors to ascertain what the residue would consist of. It would consist of what remained after providing for the payment of the debts, the delivery to the legatees of their bequests and the setting aside of sufficient property to comply with the testator's directions with regard to the maintenance, education and marriage expenses of his grandchildren. Mr. Sitarama Rao has agreed that the only grandchildren who are entitled to the benefit under these directions are the grandchildren who were born during the lifetime of the testator.

In *Pathunkutti v. Avathada kutti*¹, Muthuswami Ayyar, J., made these observations:

1. (1889) I.L.R. 13 Mad. 66 at 73.

"The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at page 556, gives an illustration, observing if one were to say 'my mansion is a charity appropriated to the poor if my son arrives,' and the son should arrive, the mansion does not still become wakf. He adds, if one should say this, 'my land is charity if such a one pleases,' and if the person referred to should indicate his pleasure, still the wakf would be void. I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property. I do not desire to be understood as saying that the interposition of an intermediate estate limited in duration would invalidate the creation of a wakf, provided that there was an out and out appropriation at the time of the settlement. In that case, the appropriation to religious use would only be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation might fail altogether."

These observations were quoted with approval by the Allahabad High Court in *Khaliluddin v. Sri Ram*¹, where it was held that when a wakf is challenged as being invalid because it constitutes a contingent dedication the test is to see whether the dedication was complete at the time it was made and not dependent on an event which might or might not happen.

In *Rustam Ali Khan v. Mushtaq Husain*², the Allahabad High Court held that a wakf was not invalid because the creator had directed that the income of the estate should be devoted in the first instance to the paying off of a mortgage debt on the property. This case went to the Privy Council (*Muhammad Rustam Ali Khan v. Mushtaq Husain*³) but the question was not raised there. The inference is that the point was not taken because it was obviously unsustainable.

In "Tudor on Charities" it is said (Tudor on Charities, 5th edition, page 61)

"If the gift to charity is residuary upon a void gift, the general rule is that it fails, if the Court finds that the precedent gift is of unascertainable amount. But the charitable gift is valid if the subject-matter needed for the precedent gift can be reduced to certainty by means of an inquiry."

The cases on which this statement of the law is based are given in the footnote. In the present case the residue of the estate was readily ascertainable and the executors were directed to deliver it over to the wakf trustees with all convenient speed. In these circumstances it cannot in our judgment be said with reason that there was uncertainty with regard to the property dedicated or that the dedication was subject to a contingency.

The next question is whether the dedication of that part of the residue which consists of movable property is unlawful. Before the passing of the Mussalman Wakf Validating Act it was the view of this Court and of other High Courts in India, except the Allahabad High Court, that there could not be a valid dedication to wakf of movable property, unless it were accessory to land or allowed because of certain traditions concerning the Prophet and the sacred writings or there was a custom to make wakf of it. See *Kadir Ibrahim Rowther v. Mohamed Rahamatulla Rowther*⁴. The contesting defendants say that all this has been changed by the Validating Act of 1913 and we consider that there is great force in this argument. A "wakf" is there defined as the permanent dedication of "any property" for any purpose recognised by the Mussalman law as religious, pious or charitable. On behalf of the plaintiff it has been said that as the object of the Act was to make lawful, dedications of property for the benefit of the descendants of the creator of the wakf it cannot be taken to alter the law in any other respect. The Court can, however, only have regard to the wording of the sections in the Act when no ambiguity exists. While it is true that the primary object of the Act was that just mentioned it was necessary to define "wakf" and the definition must have general application. There cannot be one definition of wakf when the object falls within the Act and a different definition when it does not. In any event this wakf falls within the Act and we hold that the fact that the property dedicated includes movable property does not in any way affect its validity.

This brings us to the question of the validity of the five objects for which the wakf trustees can devote the income in the event of the family becoming extinct. All these objects are included in the list given in Mullah's "Principles of Mohamma-

1. (1933) I.L.R. 56 All. 293.

2. (1916) 14 A.L.J. 554.

3. (1920) 39 M.L.J. 263 : L.R. 47 I.A. 224 :

I.L.R. 42 All. 609 (P.C.).

4. (1909) I.L.R. 33 Mad. 118.

dan Law" as valid objects of wakf. It is common ground that the first two objects are valid. The third object is celebrating death anniversaries of the testator and the members of his family. In *Ramanadhan Chettiar v. Veda Levvai Marakayar*¹, this Court held that the performance of *fateha* which so far as it involved the expenditure of money consisted in feeding the poor, was a valid object of wakf. The judgment in that case was approved by the Privy Council in *Ramanadhan Chettiar v. Veda Levvai Marakayar*², where their Lordships pointed out that part of the *fateha* ceremony was to feed the poor. In *Kaleloole Sahib v. Nuzeruddem Sahib*³, it was held that a wakf by a Mohammadan lady for the upkeep of her husband's tomb and "for the daily, monthly and annual expenses of the aforesaid mausoleum, such as lighting, frankincense, flowers, and the salaries of repeaters of Koran and readers of benediction, etc., as well as for the annual *fateha* ceremonies of the deceased and after my death for my annual *fateha* ceremony" was not valid as it ran contrary to the rule against perpetuities. In *Kunhankutty v. Ahmad Musaliar*⁴, it was pointed out that in view of the decision of the Privy Council in *Ramanadhan Chettiar v. Veda Levvai Marakayar*² this decision could no longer be considered good law. We hold that the observance of the anniversaries of the deaths of the testator and members of his family, involving as it does the feeding of the poor constitutes a valid object of the wakf.

The fourth object is the reading of the Koran in public places and also at private houses. Here the plaintiff relies on the judgment of Stanley, C.J., in *Mozher Hussain Khan v. Abdul Hadi Khan*⁵, and the judgment of this Court in *Kunhankutty v. Ahmed Musaliar*⁴. In the former case, Banerji, J., held that where a substantial portion of the income of the wakf property was devoted to the expenses of the annual *fateha* of the founder and the members of her family, the annual expenses of burning lamps in a mosque and the salary of Hafiz and readers of the Koran the wakf was valid. Stanley, C.J., doubted the validity of such a foundation. In the second case this Court held that the dedication of property for the purpose of providing funds for the recitation of Koran over the tomb of a private person, although he be a descendant of the Prophet, did not create a valid wakf. On the other hand, the defendants rely upon the provisions of the Validating Act and the following passage to be found in Ameer Ali's work on Mohammadan Law; (Ameer Ali's Mohammadan Law, I Vol., p. 273.)

"The words 'piety' and 'charity' have a much wider significance in Mussalman law and religion than in any other system. *Khair, birr, ishan*, etc., include every purpose which is recognised as good or pious under the Mussalman religion and the Mussalman law; and the test of what is 'good' or 'pious' or 'charitable' is the approval of the Almighty. Every 'good purpose' (*Wajah-ul-Khair*) which God approves, or by which approach (*Kurbat*) is attained to the Deity, is a fitting purpose for a valid and lawful wakf or dedication. A provision for one's self, for one's children, for one's relatives, is as good and pious an act as a dedication for the support of the general body of the poor."

This is not a case of the founder of wakf merely directing the Koran to be read over his tomb and therefore does not fall within *Kunhankutty v. Ahmad Musaliar*⁴. The reading of the Koran in public and private places can only be regarded as religious and pious and it seems to us that it must also be regarded as charitable, for the reading is for the benefit of all Mussalmans. The fact that money may be expended on the reading of the Koran in private places as well as in public places does not detract from the religious, pious and charitable character of the object.

The fifth object is the maintenance of poor relations and dependants. The decision of the Allahabad High Court in *Mukaram Ali Khan v. Anjumanunnissa Bibi*⁶ is directly in point here. In that case it was held that a wakf created for the reading of *fateha* and for charitable purposes including the maintenance of the founder's poor relations and dependants was valid according to Mohammadan law. Strong support for the validity of this provision is also to be found in Baillie at page 586, and Ameer Ali, Volume No. 1 at page 370. We agree with the learned Trial Judge that this is a valid provision according to Mohammadan law.

1. (1910) 20 M.L.J. 254 : I.L.R. 34 Mad. 12. 4. (1934) 68 M.L.J. 107 : I.L.R. 58 Mad. 204.
2. (1916) 32 M.L.J. 101 : L.R. 44 I. A. 21 : 5. (1911) I.L.R. 33 All. 400.
I.L.R. 40 Mad. 116 (P.C.). 6. (1922) I.L.R. 45 All. 152.
3. (1894) 5 M.L.J. 40 : I.L.R. 18 Mad. 201.

But even supposing that the last three objects are invalid, this would be no ground for holding that the wakf failed. Amter Ali points out (Volume No. 1, page 414) that the *cy-pres* doctrine is carried to the utmost limit in the Mussalman system. In *Ruquia Begam v. Surajmal*,¹ the Allahabad High Court expressly held that if one of the objects was good and one bad, the whole of the income could be devoted to the good object. With this opinion we are in agreement.

It follows that in our judgment the testator created a valid wakf in respect of the residue of his estate for the object set forth in his will and that the estate must be administered in accordance with the testator's directions. Consequently the appeal will be allowed and the plaintiff's memorandum of cross-objections dismissed. The appellants and their supporters will have one set of costs out of the estate and the plaintiff and his supporters another set of costs, also out of the estate. We certify for two counsel. The plaintiff's memorandum of cross-objections will be dismissed without costs.

The memorandum of cross-objections filed by the fifth defendant has reference to the gift of jewels which the testator made to his second son Yunus. At page 109 of the evidence the learned Judge caused the following note to be made :

"There were two boxes in an iron safe in the Essex Lodge. Under clause 13 of the will, Sir Hajee declared that he had already made a gift of the jewels in one box to Yunus and the jewels in the other box to Dada. The fifth defendant claims the jewels said to have been gifted to Yunus and the second defendant claims his jewels contained in one of these boxes. All the parties now agree through their advocates that these jewels claimed by Yunus's widow, the fifth defendant and by the second defendant may be declared to be theirs. They all say that they do not lay any claim to them. The plaintiff says that he does not recognise their claims to these jewels under the will but even apart from the will, they are entitled to them and they may have them. Therefore their claim to this jewellery need not be tried and no evidence is recorded about it."

The fifth defendant is the widow of Yunus.

At page 179 of the judgment, the learned Judge says :

"As regards the jewels which are alleged to have been gifted to the late Mohammed Yunus by Sir Hajee, the written statement of the fifth defendant states that the gift was made long prior to the death of Sir Hajee and that the gift was valid. This is what was conceded by all parties at the time of the trial. The result of this is not that the jewels in question can be handed over to the fifth defendant solely but to all the heirs of the late Yunus, of whom the fifth defendant is one."

The fifth defendant states that the note made by the learned Judge in the course of the evidence constitutes an agreement between all the parties that she personally was to have the jewels. We do not agree. The paragraph which we have quoted from the judgment shows that the learned Judge only intended that the fifth defendant was to have the jewels handed to her as representing the estate of her deceased husband, and this course will be followed.

The memorandum of cross-objections filed by the fifth defendant is dismissed, but we do not think it necessary to make any additional order for costs.

The agreement with regard to the Calcutta Distillery shares referred to in the last paragraph of page 175 of the judgment of Somayya, J., stands.

The estate will be administered by the receivers in accordance with our judgment. If any directions are required they will be given on application by the receivers to the Original Side.

B.V.V.

Appeal allowed. Memo of objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE KUPPUSWAMI AYYAR.

Thambi *alias* Subbaraya Pillai

Prisoner*

Criminal Trial—Arrest of accused person—Necessity for evidence of when and where and the circumstances in which the arrest was made.

1. 1936 A.L.J. 231.

* R. T. No. 101 of 1944.

(Cr. A. No. 374 of 1944).

Evidence of arrest of an accused person should invariably be given unless there is any special reason for not doing so. It is always helpful for the Court to know when and where the accused person was arrested because it is a circumstance that may be of assistance to the Court not only from the point of view of testing the prosecution evidence but also in the interest of the accused himself.

R. T. No. 130 of 1942, reaffirmed.

The evidence of arrest should not only state the date but also the place of arrest and the special circumstances attending it.

Trial referred by the Court of Session of the Coimbatore division for confirmation of the sentence of death passed upon the prisoner in C. C. No. 49 of 1944 on 15th April, 1944, and appeal by the said prisoner against the said sentence of death.

V. R. Narayanan for the Prisoner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Judgment of the Court was delivered by

Mockett, J.—The accused has been convicted and sentenced to death for the murder of one Chakkayya Pillai on the 31st December, 1943. At the same time, he was tried and convicted for the attempted murder of Palaniswami Pillai. For this, he was sentenced to transportation for life.

* * * * *

[After discussing the merits of the case, his Lordship proceeded :—]

The accused was arrested on the 13th January, 1944, having absconded since the 31st December, 1943, the day of the occurrence. We were interested to know where he was arrested, but this is not stated. Reference to the case diary shows that he was produced from somewhere by two villagers to the Police. With regard to this aspect of the case we propose to say a few words in conclusion. As to this referred trial and appeal, the learned Judge was manifestly right. He could not possibly have come to any other conclusion. Both the convictions and the sentences are confirmed and the appeal is dismissed.

We desire to emphasise, as we have done in a previous case, that evidence of arrest should not only state the date, but the place of the arrest. It may be—and often is—of the greatest importance, frequently in the interests of the accused, for it to be known where and when the arrest is made. It is obvious that an arrest made soon after the occurrence in the accused's own village may put one complexion on a case. An arrest of the accused made long after in a distant place may have a different significance. We have already expressed these views in R. T. No. 130 of 1942, when the Bench made these observations :

"P. W. 11 is the investigating officer. We made this comment about his evidence. He deputed a constable to arrest the accused, but the constable has not given evidence. We have had cause to notice recently that there has been a tendency on the part of the prosecution not to give evidence of arrest. In our view, evidence of arrest should invariably be given unless there is any special reason for not doing so. It is always helpful for the Court to know when and where the accused person is arrested because it is a circumstance that may be of assistance to the Court not only from the point of view of testing the prosecution evidence but also in the interest of the accused himself."

Police officers should always be in a position to provide the Court with the date and place of arrest and any special circumstances attending it. The learned Sessions Judges should require these details from the police witnesses.

R.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

The Tinnevely Motor Bus Service Company, Limited, through its managing director R. Velayutham Pillai

.. Appellant*

v.

The Province of Madras, represented by the District Collector of Tinnevely

.. Respondent.

Motor Vehicles Act (IV of 1939)—Collector rejecting application for refund of licence fee—Civil Court's right to question order of Collector—Limits.

Though the Civil Court can go only into the question whether the Collector disposed of applications for refund of motor vehicles tax, *bona fide* on the materials placed before him, yet, the Collector's rejection of an application for refund without applying his mind to the reasonableness or unreasonableness of the time taken in surrendering the licence is a matter which the civil Court can go into. The order passed by the Collector should on its face show that he has considered the application for refund from a proper standpoint.

Appeals against the decrees of the Court of the Subordinate Judge of Tinnevely in A. S. Nos. 66 to 74 of 1942, preferred against the decrees of the Court of the District Munsiff of Tinnevely in O. S. No. 530 to 535 of 1940.

R.S. Srinivasacharya and K. V. Rajagopalan for Appellant.

The Government Pleader (K. Kuttikrishna Menon) for Respondent.

The Court delivered the following

JUDGMENT.—While I agree with the view taken by the lower appellate Court that the Civil Court can go only into the question whether the Collector has disposed of the applications for refund of the Motor Vehicles tax, *bona fide* on the materials placed before him, I am of opinion that in S. A. Nos. 320 to 324 of 1943, the orders of the Collector refusing refund require revision and reconsideration. I say this because it does not appear from the orders themselves whether the Collector applied his mind to the question whether the licences were surrendered within a reasonable time after the relevant date. The Subordinate Judge refers to the fact that in the office note, put up for consideration by the Collector it was pointed out that there were no explanations for some portion or part of the periods in question. We have no right to look into these office notes and be guided by what is said therein either in favour of the applicant or against him. Especially in cases where the Collector is constituted a special authority to decide whether refund is to be ordered or not and to that extent the jurisdiction of the Civil Court is ousted, it is very necessary that the order passed by him should on its face show that he has considered the application for refund from a proper standpoint before passing final orders. In other words, in cases like the present, the Collector must indicate that the reasonableness or unreasonableness of the time taken in surrendering the licence was taken into account by him before he refused the refund. The orders passed by the Collector out of which S. A. Nos. 320 to 324 have arisen do not show this at all. Only in S. A. No. 325 I find it stated "Licence not surrendered within reasonable time. Rejected." So this last second appeal must go. In the other five second appeals whether refund might be allowed or not, which will be dependent on the further question whether in each case the licence was surrendered within a reasonable time will have to be considered afresh by the Collector, whose decision will then become final and not open to challenge in any suit in any Civil Court.

The decrees of the lower Court are set aside and in their place there will be decrees directing the Collector to take the petitions on file and dispose of them afresh according to law and in the light of the aforesaid observations. Each party will bear his own costs throughout. S. A. No. 325 of 1943 will stand dismissed with costs. (Leave to appeal refused).

K.C.

Decrees set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Gullipilli Ramulu and others

.. Appellants*

v.

Kokku Venkatasubba Rao and others

.. Respondents.

Specific Relief Act (I of 1877), section 27—Contract of sale entered into with some members of a Mahomedan family—Subsequent sale to a third party—Knowledge in the third party of previous sale—Suit for enforcement of contract—Whether all members should be made parties to the suit.

A contract which cannot be enforced in full at the time the contract was entered into may nevertheless be enforced if it can be fulfilled at the time of the filing of the suit.

Adinarayana v. Venkatasubbayya, (1940) 1 M.L.J. 251 : I.L.R. (1940) Mad. 852, applied.

The plaintiff entered into a contract for the purchase of certain properties with defendant 1, the eldest son of a deceased Mahomedan who purported to act on behalf of the whole family consisting besides himself of his brother, mother and four minor sisters. A registered sale deed was subsequently executed. Later on some additional property was conveyed to the plaintiff by an unregistered deed signed by defendant 1 and his brother the 3rd defendant. Subsequently that land, along with others were sold by defendants 1 to 3 to the father of defendants 8 to 11 who had notice of the previous sale for value. On the question as to what relief, if any, can be granted in a suit for enforcement of the agreement relating to the suit transaction,

Held, that section 27 of the Specific Relief Act makes a contract enforceable not only against the party thereto but also against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid the consideration in good faith and without notice of the previous contract. In the circumstances of the case the defendants 8 to 11 were proper parties to the suit as transferees from defendants 1 to 3 against whom the contract was to be directly enforced; and as they were in a position to fulfil the contract in its entirety, the contract can be enforced.

Appeal against the decree of the Court of the Subordinate Judge, Bezwada in A. S. No. 52 of 1940, preferred against the decree of the Court of the District Munsiff, Bezwada, in O. S. No. 621 of 1937.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellants.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—The first plaintiff was desirous of acquiring a house site belonging to defendants 1 to 7, a family of Mohammadans. The father was dead. The second defendant is the mother. The first and third defendants are sons, the first defendant being the elder. Defendants 4 to 7 are daughters. The first defendant, purporting to act on behalf of the whole family, entered into an agreement, Ex. G, to convey certain property; and on the 10th May, 1934, a registered sale deed (Ex. G-I) was executed by all the adult members of the family, purporting to act on behalf of themselves and the minors, defendants 4 to 7. The plaintiff says that owing to the insistence of the Municipality on a margin around the property being left for passages, he found that the area conveyed to him was insufficient for his purposes. So he entered into negotiations with the major members of the family for the conveyance of a further area of land. On the 2nd October, 1934, Ex. A was drawn up, by which the first and third defendants purported to agree to the conveyance of the area of 44 square yards with which we are now concerned; but only the first defendant signed it. On the 3rd November, 1934, a sale deed Ex. B was drawn up, but not executed by all the members of the family. It was signed only by defendants 1 and 3, and was not registered. Sometime after this, a much larger area of land, including the 44 square yards was conveyed on the 18th November, 1934, by Ex. I to the father of defendants 8 to 11. It has been found by the Courts below that the father of defendants 8 to 11 had notice of the earlier agreements to sell. The plaintiff brought the present suit for the enforcement of the agreement to sell. The question is what relief, if any, can be granted to him.

The trial Court found that the agreement was not binding on the mother, the second defendant, or upon the minors; but that the plaintiff was entitled to enforce his agreement against the shares of defendants 1, 3 and 4. As the plaintiff would then in equity be able to bring a suit for partition of the whole site and, subject to other equities, to have the 44 square yards allotted to him, the District Munsiff saw no reason why the whole process should not be completed in this suit. He therefore passed a decree granting the plaintiff the relief he asked for. The lower appellate Court confirmed the decree of the first Court and dismissed the appeal.

Both the lower Courts thought that because the fourth defendant was *ex parte* the plaintiff was entitled to relief as far as her share is concerned, but I am unable to discover on what principle the lower Courts acted; for we are not now concerned with the fourth defendant's rights, which have disappeared by virtue of the sale to the father of defendants 8 to 11, in which she joined. As defendants 8 to 11 now own her share, they are at liberty to show that the share of the fourth defendant was not legally conveyed. It has not been proved that the fourth defendant knew anything about the contract Ex. A; and so one must presume that as it was entered

into only by the first defendant and ratified by the third defendant, those two persons are alone bound by the contract.

The argument for the appellant is that as the contract cannot be enforced in its entirety, because the parties bound by the contract do not possess more than a portion of the land, specific performance can only be granted with regard to their shares in the 44 square yards of land, and then only on payment by them of the full consideration. That is the principle laid down in *Baluswami Iyer v. Lakshmana Iyer*¹. The learned Subordinate Judge's argument was that as the first and third defendants were entitled not only to a share in the 44 square yards but in the whole of the site and as they had a right to partition, the Court could consider the partition to have been effected and the 44 square yards to have fallen to the share of the first and third defendants and to be therefore available for the satisfaction of the plaintiff's contract. That cannot, however, be done. As was pointed out in *Rangayya Reddi v. Subramania Iyer*², the right to partition only accrues after the land has been conveyed, i.e., after the suit for specific performance has been decreed and executed. Moreover, the only proper parties to a suit for specific performance are the persons bound by the contract; and it would be an unwarranted expansion of such a suit to add as parties persons who are not bound by the contract and become proper parties only when the property is to be divided.

The claim of the defendants can however be looked upon in a slightly different way. If the first and third defendants had acquired the right to sell all this 44 square yards during the continuance of the contract, there can be no doubt that although the plaintiff would not have been able to enforce the contract against the whole of the 44 square yards at the time the contract was entered into, he would be able to do so as soon as the first and third defendants had obtained possession of the whole of the 44 square yards. That a contract which cannot be enforced in full at the time the contract was entered into may nevertheless be enforced if it can be fulfilled at the time of the filing of the suit, has been settled by *Adinarayana v. Venkatasubbayya*³. Since defendants 8 to 11 had notice of the contract and are as much bound by it as their transferors, the first and third defendants, they, too, are bound to fulfil the contract if it lies within their power to do so. Section 27 of the Specific Relief Act makes a contract enforceable not only against the party, but against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid the consideration in good faith and without notice of the original contract. The defendants 8 to 11 were therefore proper parties to the suit, as transferees from defendants 1 and 3 against whom the contract can be directly enforced. As they are in a position to fulfil the contract in its entirety, the contract can and must be enforced. The appeal is therefore dismissed with costs, except that the decree will require defendants 8 to 11 to fulfil the contract and not defendants 1 and 3, who have no interest in the property and have therefore nothing to convey.

K.C.

Decree varied.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Kantam Mahalakshmi and another

... Appellants*

v.

Bhimireddi Venkatareddi

.. Respondents.

Transfer of Property Act (IV of 1882), section 53-A—Written contract of sale in favour of defendant—Consideration paid by and possession delivered to defendant—Transaction prior to Transfer of Property (Amendment) Act (XX of 1929)—Subsequent sale by the widow of original owner in favour of another—Suit for recovery of possession against defendant—Rights of the defendant.

One R executed a written contract dated 26th August, 1929, to sell certain property to the defendant. The latter paid a sum of Rs. 533 and possession was given to him of the property. R's widow later on sold the property to another and the widow and the subsequent purchaser brought a

1. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 605 (F.B.).

(F.B.).

2. (1916) 32 M.L.J. 575 : I.L.R. 40 Mad. 365

3. (1940) 1 M.L.J. 251 : I.L.R. (1940) Mad. 852.

* S. A. No. 1879 of 1943.

27th April, 1944.

suit for recovery of possession of the property from the defendant. The defendant relied upon the doctrine of part performance.

Held:—(i) The defendant has no right to rely upon section 53-A as the Transfer of Property (Amendment) Act, 1929, came into force subsequent to the contract of sale and section 53-A has no retrospective effect;

(ii) as there was no registered sale deed in favour of the defendant the suit for possession by the original owner has to be decreed on condition of repayment by him of the consideration received; and

(iii) the defendant has a right to file a separate suit of his own for enforcing specific performance of the contract in his favour subject to any question of limitation that may arise.

Ariff v. Jadunath Majumdar, (1930) 60 M.L.J. 538 : L.R. 58 I.A. 91 : I.L.R. 58 Cal. 1235 (P.C.) and *Kanakamma v. Krishnamma*, (1943) 1 M.L.J. 335 : I.L.R. 1943 Mad. 831 (F.B.), followed.

Appeal against the decree of the Court of the Subordinate Judge, Guntur, dated 17th August, 1943, in Appeal No. 6 of 1942 (A. S. No. 391 of 1941, on the file of the District Court, Guntur) preferred against the decree of the Court of the District Munsiff, Guntur, in O. S. No. 766 of 1937.

P. Somasundaram for Appellants.

V. Rangachari for Respondents.

The Court delivered the following

JUDGMENT.—The two plaintiffs who filed the suit for recovery of possession and whose suit has been dismissed are the appellants before me. The property originally belonged to one Raghava Reddi, who as has been found by the lower appellate Court, had executed a written contract of sale in favour of the respondent (defendant) on the 26th August, 1929. A sum of Rs. 533 was paid to Raghava Reddi and possession was delivered to the defendant. The truth of this contract of sale, payment of consideration and delivery of possession to the defendant have all been found by the lower appellate Court. The first plaintiff is the widow of Raghava Reddi, who died on the 5th October, 1933. It is enough to state that the second plaintiff is the purchaser from the first plaintiff under a sale deed dated 29th August, 1934.

One defence raised to the plaintiff's action was that the defendant was in possession under a contract of sale executed on the 26th August, 1929, accompanied by payment of consideration and the doctrine of part performance was invoked by the defendant. The lower appellate Court upheld this defence and dismissed the suit. The trial Court had decreed it on other grounds with which we are not now concerned. The decision of the appellate Court does not take note of the fact that as the law was interpreted by the Judicial Committee in *Ariff v. Jadunath Majumdar*¹, where there was no registered sale deed in favour of the respondent-defendant, the suit for possession by the original owner has to be decreed leaving it to the defendant to file a separate suit of his own for enforcing specific performance of the contract of sale in his favour, if that suit is in time. The lower appellate Court relied upon section 53-A of the Amending Act XX of 1929 and upheld the defendant's rights to be in possession. Unfortunately, it has been held by a Full Bench of this Court in *Kanakamma v. Krishnamma*², that the doctrine of part performance embodied in section 53-A of the Transfer of Property Act has no retrospective effect. The transaction under which the defendant claims is of the 26th August, 1929. The amending Act came into force on the 1st April, 1930. Under the Full Bench decision, the defendant has no right to rely upon section 53-A of the amended Act. The position is therefore governed by the decision of the Judicial Committee in *Ariff's case*¹. The defendant might have adopted the course suggested in that decision of filing a suit for specific performance and requesting a stay of the trial of this suit.

It is urged by Mr. Rangachari, learned advocate for the respondent that this point was not taken in either Court and that therefore his client did not file a separate suit. He also says that as soon as the appeal memorandum filed in this second appeal was sent to him by his client, he advised the filing of a separate suit

1. (1930) 60 M.L.J. 538 : L.R. 58 I.A. 91 : I.L.R. 58 Cal. 1235 (P.C.).

2. (1943) 1 M.L.J. 335 : I.L.R. (1943) Mad. 831 (F.B.).

for specific performance. But he is unable to state whether by this time a suit has been filed. Under the circumstances, I can only decree the present suit and state that nothing said or contained in this judgment will affect the rights, which the defendant herein may put forward either in a suit already filed, or in a suit to be filed hereafter. The present decision is only that until and unless he gets a decree for specific performance of the contract of the 26th August, 1929, the defendant is not entitled to retain possession of the land.

On the finding that the contract of the 26th August, 1929, evidenced by Ex. I is true and that Rs. 533 was paid under that document, which finding I accept, the defendant is entitled to be repaid the purchase money prepaid under the terms of section 55 (6) (b) of the Transfer of Property Act. It is enough to refer to what Mr. Mulla says on page 284 of the second edition of his Transfer of Property Act. In reversal of the decree of the lower appellate Court, I give a decree to the plaintiffs for possession of property on condition of their paying into Court a sum of Rs. 533. The defendant will not be entitled to any interest on this sum and the plaintiffs will not be entitled to any mesne profits. From the date when after depositing the amount, notice is given to the defendant of the deposit, the plaintiffs would be entitled to mesne profits until delivery of possession. The decree will also contain a direction that this decree is subject to the result of a suit already filed, or to be filed by the defendant for specific performance. Each party will bear his own costs throughout.

Leave is refused.

V. P. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WAPSWORTH.

Shahool Ameeth Ali and another

.. *Petitioners**

v.

Dayaram Singh *alias* Jayaram Singh and another

.. *Respondents.*

Civil Procedure Code (V of 1908), section 115 and Order 47, rule 1 (1)—Mistake affecting judgment of party and not decision of Court—Court has no jurisdiction to review.

Where the mistake is one affecting the judgment of the party and there is none affecting the decision of the Court and the mistake is to some extent of the party's own making the Court has no jurisdiction under Order 47, rule 1 (1) of the Civil Procedure Code in review to set aside a decree passed on a compromise which would by the ordinary law of contracts be binding on the party.

Acting on a letter sent by the Inspector of Local Boards in reply to a letter of their advocate, the debtors agreed to a compromise fixing the amounts they had to pay, thinking that they were not entitled to relief under the Agriculturists' Relief Act. On an inquiry made by the Court, the debtors discovered that a mistake had occurred and thereupon applied for a review, which the lower Court granted.

Held, that in the circumstances the Court had no jurisdiction to grant the review.

Alamelu Ammal v. Rama Iyer, (1922) 43 M.L.J. 290 and *Govinda Chettiar v. Varadappa Chettiar*, (1939) 2 M.L.J. 809, distinguished.

Lalji Sahu v. Collector of Tirhoot, (1871) 6 Beng.L.R. 648 (P.C.), referred to.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Erode, dated 19th January, 1943, and made in I. A. No. 907 of 1942 in O. P. No. 104 of 1941.

G. R. Jagadisan and J. R. Alwar Naidu for Petitioners.

R. Ramamoorthy Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners pray for the revision of an order of review. There is no doubt about the facts. The question before the lower Court was whether

the respondents were entitled to relief under Madras Act IV of 1938 in respect of certain mortgage debts. The decision of that question depended upon the further question whether the mortgage debts were advanced on security of house property situated within a panchayat which was a union before the 26th August, 1930, under section 4 (d) of the Act. The advocate for the debtors wrote a letter to the Inspector of Local Boards which is not before me, to which the reply was that the "Brahmana Periya Agraharam Panchayat Board was constituted in this office R. Dis. No. 925 of 1929 dated the 19th December, 1929." Acting on this letter the debtors came to the conclusion that they were not entitled to relief under the Act and they therefore agreed to a compromise fixing the amounts which they had to pay. Independently of the letter sent by the debtors' advocate there was an enquiry made by the Court regarding the date on which this Agraharam was made into a union and this elicited the reply that the Agraharam was not a union before the 26th August, 1930. One can only conjecture that the letter sent by the debtors' advocate must have asked when the panchayat was founded and the panchayat presumably was founded before it was made into a union as frequently happens. Now, on the debtors discovering that they had consented to this compromise under a misapprehension regarding the date of the foundation of the union, they applied to the lower Court for review. The learned District Munsiff has found that this is a case of discovery of a new and important matter coming under Order 47, rule 1 (1) of the Civil Procedure Code or alternatively that the decision may be reviewed for "any other sufficient reason."

My attention has been drawn to the decision in *Alamelu Ammal v. Rama Iyer*¹ where a Bench of this Court decided that the fact that a party was made to sign a compromise by a misrepresentation as to the character of the document on which the signature was obtained is a sufficient ground for review. In *Govinda Chettiar v. Varadappa Chettiar*², Patanjali Sastri, J., held that, when it was shown that counsel failed to argue a case completely owing to a misapprehension with the result that the judgment was pronounced without his client's case being fully presented before the Court, it was sufficient cause for interference in review. Both these are cases in which an error has been made which has affected the Court's decision. In the first case, the Court would never have passed a decree in terms of the compromise if it had known that one of the parties had not consented to the compromise. In the second case, the Court would never have pronounced judgment if it had known that the advocate had not concluded his argument. The present case is one in which admittedly both parties consented to the compromise. One of them gave his consent owing to a mistake which probably could have been avoided with a little more care. But the mistake was one affecting the judgment of the party. There was no mistake affecting the decision of the Court. It seems to me that if we look upon this compromise as a mere contract, it could not be set aside merely because one of the parties had given his consent owing to an error of fact to some extent of his own making; and it seems to me that the Court has no jurisdiction in review to set aside a decree passed on a compromise which compromise would, by the ordinary law of contracts, be binding on the party. I have been referred to a decision in *Lalji Sahu v. Collector of Tirhoot*³, which is, however, one resting on very special facts wherein the Court's order contemplated a right of review to the party wishing to have the compromise modified. I am of opinion that the learned District Munsiff has exceeded the jurisdiction conferred upon him under Order 47, rule 1 (1) of the Civil Procedure Code and I set aside the order of review and restore the decree as it stood before review. The petitioners will be entitled to their costs against the first respondent in this Court.

V.P.S.

Petition allowed.

1. (1922) 43 M.L.J. 290.
2. (1939) 2 M.L.J. 809.

3. (1871) 6 Beng.L.R. 648 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT — MR. JUSTICE HORWILL.

Adhilakshmi Ammal

.. Appellant*.

v.

T. Nallasivan Pillai (died) and others

.. Respondents.

Transfer of Property Act (IV of 1882), section 43—When plaintiff can base claim on a cause of action which was not put forward within the period of limitation—Plaintiff can be given a partial share even though she denies the rights of the other party—One sharer cannot claim to recover property on behalf of another when that other is a party to the litigation.

One V was the original owner of the suit property which he had gifted away to his daughter A. A had three daughters R, VV and M. VV died leaving a daughter C, and M became a widow. An agreement was entered into between R and C by which R was to take 2/3 and C 1/3 and R was to maintain M. R had two sons S and the 10th defendant and two daughters the plaintiff and the 9th defendant. After S's death his sons defendants 1 and 2 got into possession of R's 2/3. In a suit by the plaintiff for recovery of possession, C was not made a party and the 9th defendant, the other daughter, filed her written statement beyond the period of limitation and did not also prefer any appeal against the lower Court's order.

Held, (i) that the suit is maintainable even though C was not made a party ;

(ii) the plaintiff could be given a partial share even if she had denied the rights of C, as the plaintiff put all the facts before the Court, but wrongly interpreted them as to lead her to assert that C had no right at all.

Rama Naicken v. Muthayammal, (1911) 21 M.L.J. 997 and *Ponnayya Tirumalai Vandaya Thevar v. Kandaswami Vandaya Thevar*, (1912) 17 I.C. 136, referred to.

(iii) The plaintiff could base her claim on a cause of action which was not put forward within the time of limitation if she had placed all the facts before the Court, and, it is for the Court to apply the correct legal principles and give the plaintiff her due.

Vaithilingam Pillai v. Kandaswami Pillai, (1930) 60 M.L.J. 713, distinguished.

(iv) Section 43 of the Transfer of Property Act applies only when a party having special knowledge makes an incorrect representation to the other party to the contract, whereby the other party is induced to enter into the contract and the person making the representation gets the benefit of it.

(v) The 9th defendant had lost her rights by not appealing to the first appellate Court inasmuch as the plaintiff cannot be said to represent her interest especially as she was a party to the litigation.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevely in A. S. No. 12 of 1942, preferred against the decree of the Court of the District Munsiff of Tinnevely in O. S. No. 41 of 1938.

V. Ramaswami Aiyar and N. S. Sundaram for Appellant.

K. Subba Rao and A. V. Avudainayagam for Respondents.

The Court delivered the following

JUDGMENT.—The property now in dispute originally belonged to one Venkatachalam, who conveyed it by gift to his daughter Adilakshmi. As it was the *stridhanam* property of Adilakshmi, it descended to her daughters Ramalakshmi, Venkatachalavadvoo and Mahalakshmi. As Mahalakshmi had become a widow and Venkatachalavadvoo had died leaving a daughter Chellathammal, Ramalakshmi entered into an agreement, Ex. B, with Chellathammal, whereby they divided the property roughly in the proportion of two to one, Ramalakshmi undertaking to support her widowed sister Mahalakshmi. The suit property is the property that fell to the share of Ramalakshmi. Ramalakshmi had two sons, Subramania and the 10th defendant, and two daughters, the plaintiff and the 9th defendant. After Ramalakshmi's death her elder son Subramania seems to have got possession of the property, and since his death, his sons, the first and second defendants, have been enjoying it. The plaintiff brought the present suit, claiming that the suit property belongs to her and the 9th defendant. Both the lower Courts have held that the property belonged jointly to the plaintiff, the 9th defendant, and Chellathammal, and that as Chellathammal was not made a party, the suit was not maintainable. Incidentally, the trial Court found that the 9th defendant was not entitled to any share for the further reason that by the time she had filed her written statement laying claim to a share, her claim would have been barred

by limitation. She did not appeal in the lower appellate Court; and so the lower appellate Court also found that the 9th defendant would not have been entitled to recover her share in the property even if the plaintiff had been successful. The plaintiff has filed this appeal.

Mr. V. Ramaswami Ayyar contended that although Ex. B, the transaction entered into between Ramalakshmi and Chellathammal, is not a legally binding contract, because Chellathammal at that time possessed nothing more than a *spes successionis*, she would be precluded from questioning that contract by the principle of estoppel set out in section 43 of the Transfer of Property Act. Section 43, however, applies only when a party in possession of special knowledge makes an incorrect representation to the other party to the contract, whereby the other party is induced to enter into the contract and the person making the representation gets the benefit of it. It cannot reasonably be argued in this appeal that Chellathammal made any representation to Ramalakshmi which estops Chellathammal from questioning the right of the heirs of Ramalakshmi. Chellathammal was a young woman who had only just attained majority, whereas Ramalakshmi must have been a woman of fifty-five years of age at that time. To say the least, Ramalakshmi's knowledge was equal to that of Chellathammal; and they entered into the contract with their eyes open, though they may not have known that the contract they were entering into was void. As section 43 does not apply to the facts of this case, we have to consider the rights of the parties on the footing that the contract is void and that Chellathammal has a right to one-third of the suit property. It may incidentally be mentioned here that Chellathammal, in pursuance of the agreement Ex. B, entered into possession of the property which fell to her share under Ex. B and has apparently been in possession of it ever since.

The learned Subordinate Judge held that the plaintiff's suit must be dismissed because she denied the rights of Chellathammal; and he quoted as authorities *Rama Naicken v. Muthayammal*¹ and *Ponnayya Tirumalai Vandaya Thevar v. Kandaswami Vandaya Thevar*². In both these cases, however, the plaintiff was granted a share of the property although he prayed for the whole of it; and in *Ponnayya Tirumalai Vandaya Thevar v. Kandaswami Vandaya Thevar*², it moreover appears that the owner of the other share of the property was not on record. It is true that in *Ponnayya Tirumalai Vandaya Thevar v. Ramaswami Vandaya Thevar*², it is said:

"If he (the plaintiff) asserted an exclusive title in himself, the suit would be liable to be dismissed."

But I have not seen any case in which it was held that a plaintiff who claims the whole property must have his suit dismissed. In this case, the plaintiff has set out facts which have been assumed to be true for the purposes of the point now under appeal; and it is the Court that has to decide what legal inference has to be drawn from the facts. It would seem from the cases referred to by the learned Subordinate Judge as well as from *Shutari v. The Magnesite Syndicate, Ltd.*³ that the plaintiff would be entitled to at least one-third of the property. The plaintiff also claims that the ninth defendant should be given one-third of the property.

The claim of the plaintiff to have a share in the suit property is here opposed on two grounds. One is that the plaintiff is basing her claim on a cause of action which was not put forward within the period of limitation, and the second is the ground that I have already mentioned, that she cannot be given even a partial share if she denies the rights of the other party. For the first proposition *Vaithilingam Pillai v. Kandaswami Pillai*⁴ has been cited. That was a case in which the plaintiff originally claimed as reversioner to the estate of one Dharmalingam Pillai. The Courts found that it had not been proved that the property belonged to Dharmalingam Pillai; but that it was the absolute property of one Rajamanikathammal. The plaintiff therefore sought to amend his plaint and to claim the property as the heir of that lady. When he sought to make the amendment, the suit would have

1. (1911) 21 M.L.J. 997.

2. (1912) 17 I.C. 136.

3. (1915) 28 M.L.J. 598 : I.L.R. 39 Mad.

501.

4. (1930) 60 M.L.J. 713.

been barred ; and so the amendment was disallowed. That case seems to me to stand on a very different footing from the present case.

Here, the plaintiff placed before the Court all the facts on which she based her claim. It is true that she did not deduce her legal position properly from those facts and therefore based her suit on a wrong cause of action ; but it seems to me that when a party puts the facts before the Court, it is for the Court to apply the correct legal principles and give the plaintiff that which is due to her. The plaintiff cannot be non-suited merely because she has not properly appreciated the law bearing on the facts which she has set out in the plaint. In *Vaithilingam Pillai v. Kandaswami Pillai*¹, the plaintiff sought to put forward an entirely fresh set of facts.

In considering the other point, the same facts must be borne in mind, viz., that the plaintiff put before the Court all the facts ; but wrongly interpreted them as to lead her to assert that Chellathammal had no right at all ; but the plaintiff at no time said that if Ex. B were held to be not binding on Chellathammal, Chellathammal would not be entitled jointly with the plaintiff and the ninth defendant to the whole of the property which had descended from Adilakshmi. Mr. Subba Rao points out the practical difficulty in passing a decree in a suit in which all the sharers are not on record ; for a partition cannot be ordered in the absence of one of the sharers. That difficulty does not however arise in the present case ; for since Chellathammal lost all right to the land three days after the suit was filed, the persons who are now entitled to the property would be the plaintiff, the ninth defendant, and defendants 1 and 2. Plaintiff would be entitled to one-third, the ninth defendant to one-third, and as Chellathammal had not put forward her claim within the period of limitation, defendants 1 and 2 would be entitled to the other third.

Finally, there is the question whether the ninth defendant has lost her rights by not appealing from the decree passed against her in the trial Court. Her answer to that contention is that as the plaintiff brought the suit against trespassers and has not denied her title, she is entitled to recover the whole property from the trespassers, though she would be bound to let the ninth defendant into joint possession of the property with her after it was recovered. She points out that it was unnecessary for her to have been impleaded at all, and that if she had not been impleaded, the plaintiff would have been entitled to receive possession of the whole property. That may be so ; but the position seems to me different when the ninth defendant is in fact made a party. The plaintiff was certainly not appearing for her. She had an opportunity in the suit and in the appeal to put forward her own case. As she supported the plaintiff in the trial Court she did not there lose her right to receive her share of the property ; but the plaintiff did not represent her interest either in the lower appellate Court or in this. I do not see how one sharer can claim to recover property on behalf of another sharer if that sharer is a party to the litigation and does not take the necessary steps to support her claim. In *Rama Naicken v. Muthayammal*², a co-sharer compounded her claim with the first defendant, the trespasser, and the plaintiff was given one half of the property. It is true that the plaintiff there claimed the whole property on the ground that the second defendant had lost her right to a share in her husband's estate through unchastity ; but I have no doubt that even if she had not made that allegation, she would not have been entitled to recover the whole property, when the other co-sharer had compounded her claim by entering into an agreement with, and receiving consideration from, the trespasser. I therefore agree with the lower appellate Court that the ninth defendant has now lost her right to share with the plaintiff in the suit property. Subject to the result of the other issues in the case, the plaintiff is entitled to a one-third of the suit property.

The appeal is allowed in part and the suit remanded to the trial Court for disposal on the other issues. Costs of this appeal will abide the result and be at the discretion of the Trial Court. One-third of the court-fee will be refunded.

V.F.S.

Appeal allowed in part.

1. (1930) 60 M.L.J. 713.

2. (1911) 21 M.L.J. 997.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.
Sreemanthu Yarlagadda Sivarama Prasad Bahadur Zamindar

Garu of Challapalli

.. Appellant*

v.

Sri Chelikani Venkatarao and others

.. Respondents.

Madras Agriculturists' Relief Act (IV of 1938), sections 9 and 21—Hindu joint family—Head of one branch adjudged insolvent—Application by sons for benefits of Act—Sustainability.

A person whose estate has vested in the Official Receiver in insolvency cannot so long as that vesting continues be deemed to have a saleable interest in that estate. An undischarged insolvent therefore lacks the basic qualification for the status of an agriculturist under Madras Act IV of 1938. Where there was at the commencement of the Act an agriculturist family consisting of two branches, the head of one branch being a non-agriculturist by reason of the insolvency and the head of another branch being an agriculturist, the sons of the agriculturist brother will be deemed to be agriculturists while the sons of the non-agriculturist brother will be deemed to be non-agriculturists.

Sundaram v. Subba Rao, (1942) 1 M.L.J. 327, relied on.

Appeals against the orders of the Court of the Subordinate Judge of Cocanada dated the 15th day of March, 1940, and made in C. M. P. 595 of 1939 in O. S. No. 52 of 1933.

C. M. P. No. 2538 of 1943.—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct an amendment of the counter of the petitioner to I. A. No. 595 of 1939 in O. S. No. 52 of 1933 on the file of the Court of the Subordinate Judge of Cocanada by allowing the following words to be added to paragraph 4 now existing of the said counter and in continuation thereof "at any rate in view of their father being himself a member of an agriculturist undivided Hindu family having another branch, that is, the branch of his brother Chelikani Venkata Dharma Rao Garu and quite apart from his being a member of an agriculturist undivided Hindu family consisting of himself and his sons the petitioners."

C. M. P. No. 2539 of 1943.—Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 2538 of 1939 on the file of the High Court it will be pleased to direct an amendment of the counter of the petitioner to I. A. No. 596 of 1939 in O. S. No. 53 of 1933 on the file of the Court of the Subordinate Judge of Cocanada by allowing the following words to be added to paragraph 4 now existing of the said counter and in continuation thereof "at any rate in view of their father being himself a member of an agriculturist undivided Hindu family having another branch, that is, the branch of his brother Chelikani Surya Rao Garu and quite apart from his being a member of an agriculturist undivided Hindu family consisting of himself and his sons the petitioners."

Ch. Raghava Rao for Appellant.

V. Govindarajachari and K. Bhimasankaran for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—These two appeals arise out of two connected applications under section 19 of the Madras Act IV of 1938. The appellant in both cases is the decree-holder. The respondents in A. S. No. 269 were the petitioners in I. A. No. 595 of 1939 filed in O. S. 52 of 1933. The respondents in A. S. 270 were the petitioners in I. A. 596 of 1939 filed in O. S. 53 of 1933. Under both decrees, the first defendant was the father of the present respondents. The question agitated in the Court below was whether the respondents here could claim the benefit of Act IV of 1938, having regard to the insolvency of their fathers, the first defendant in each of the two suits. It is common ground that the decision of the lower Court proceeds on a misunderstanding of the law having regard to the rulings of this Court. The first defendant in O. S. 52 of 1933, father of the respondents in A. S. 269 obtained his discharge in insolvency on 24th September, 1938. He was therefore an undischarged insolvent when Madras Act IV of 1938 came into force. The first defendant in O. S. 53 father of the respondents in A. S. 270, obtained his discharge in insolvency on the 11th December, 1937. He was therefore a discharged insolvent on the date when the Act came into force, but an undischarged insolvent on 1st October, 1937, which would have been a relevant date had he himself been applying for the benefits of the Act with reference to section 10. On 5th April, 1939, defendants 2 and 3 in O. S. 52 respondents in A. S. 269, filed a

* Appeals Nos. 269 and 270 of 1941 and C.M.P.
Nos. 2538 and 2539 of 1943.

suit claiming partition from their father and his brother, first defendant in the connected matter, alleging that they began to live separately from the year 1924. With reference to section 6 of Act IV as interpreted in our decision in *Sundaram v. Subba Rao*¹, it becomes a matter of considerable importance whether the fathers of the two sets of respondents were or were not divided on 22nd March, 1938, when Act IV of 1938 came into force. We wish to point out that the first clause of section 10, which makes the 1st October, 1937, also one of the crucial dates under the Act, refers only to the qualifications of a person who himself applies for relief under sections 8 and 9, and it will not affect the status of an alleged agriculturist which is of importance only with reference to the application by his sons for relief having regard to the provisions of section 6. In this Court, the appellant has prayed for leave to amend his counter-affidavit filed in each of the two applications in the Court below, making an assertion that the father of the respondents was a member of an agriculturist undivided family having another branch. These amendments have been allowed subject to the right of the respondents to traverse the allegations therein in suitable pleadings in the lower Court to which we propose to remand the cases. The lower Court has proceeded on the footing that a person who is an insolvent and to whose estate the provisions of section 21 of the Act would apply is nevertheless an agriculturist, overlooking the words in that section

"if he would have been an agriculturist within the meaning of this Act but for his adjudication in insolvency."

We have to point out that a person whose estate is vested in the Official Receiver in insolvency cannot, so long as that vesting continues, be deemed to have a saleable interest in that estate. An undischarged insolvent, therefore, normally lacks the basic qualification for the status of an agriculturist under the Act. Section 21, however, applies to the administration of his estate the same principles which would have applied, had he not been an insolvent and had he still retained a saleable interest in agricultural land; always provided that no dividend has been declared. It seems to us that the effect of the insolvency of the two fathers on the applications preferred by the sons cannot be properly worked out having regard to the provisions of section 6 of the Act, without a finding on the question whether at the commencement of the Act, the two fathers, 1st defendant in each of the suits, were divided. We therefore remand the appeals to the lower Court for a finding on this question after giving the respondents an opportunity to traverse the allegations in the amended counter-affidavit of the appellant and after recording such evidence as may be adduced. Time for finding, three months. One week thereafter for objections.

* * * * *

Appeals Nos. 269 and 270 of 1941 coming on for final hearing this day, after the receipt of the finding called for by the order of the High Court dated 26th July, 1943, the Court delivered the following Judgment:

Wadsworth, J.—These two appeals were remanded to the lower Court for a finding on the question whether at the commencement of Madras Act IV of 1938 the first defendant under the decree out of which appeal No. 269 of 1941 arises and the first defendant under the decree out of which appeal No. 270 of 1941 arises, were divided, they being brothers. The two appeals are against decisions on applications by the sons of these two brothers under section 19 of Act IV of 1938 for relief on the footing that they are agriculturists. The lower Court has found that the two brothers were not divided at the commencement of the Act, that is to say, on 23rd March, 1938. The actual partition asserted by the present respondents in their affidavits was in the year 1919. The lower Court has given good reasons for rejecting this theory of partition in 1919. The documents filed in the case make it quite clear that there was no division at this time and that for many years afterwards the brothers remained divided.

An attempt has been made in appeal to suggest that though the two brothers were not divided in 1919 as asserted in the pleadings, the evidence makes out a

division in or about the year 1924. We are unable to accept this contention even if it is open to the respondents in the light of the contentions upon which the parties went to trial. It seems to us clear that the two brothers, the fathers of the present contesting respondents, were undivided at the time of the commencement of the Act.

The first defendant in O. S. 52 of 1933 with which we are concerned in Appeal No. 269 of 1941 was an insolvent when Act IV came into force. His properties having vested in the Official Receiver, he had no saleable interest therein and he cannot be deemed to have been an agriculturist.

The first defendant in O. S. 53 of 1933, with which Appeal No. 270 of 1941 is concerned had been discharged in insolvency in December, 1937. It is not contended that apart from the insolvency he was otherwise disqualified for the status of an agriculturist.

In view of the finding of the lower Court, the position is that there was at the commencement of the Act an agriculturist family consisting of two branches, the head of one branch being a non-agriculturist, by reason of the insolvency and the head of the other branch being an agriculturist. It follows from section 6 of the Act as interpreted by this Bench in *Sundaram v. Subba Rao*¹ that the sons of the agriculturist brother will be deemed to be agriculturists and the sons of the non-agriculturist brother will be deemed to be non-agriculturists.

It follows that Appeal No. 270 of 1941 which arises out of the application by the sons of the agriculturist brother has to be dismissed with costs. Appeal No. 269 of 1941, which arises out of the application by the sons of the non-agriculturist brother, is allowed with costs throughout and the application for relief under the Act is dismissed.

B.V.V.

A. S. 269 of 1941 allowed &
A. S. 270 of 1941 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Soorianarayana Chettiar

.. Appellant*

Shenbagathammal

.. Respondent.

Civil Procedure Code (V of 1908), Order 21, rule 66—Notice that sale proclamation would be settled—Substituted service—Does not amount to clear notice that validity of execution was in question—Cannot operate as estoppel or res judicata.

In execution of a simple money-decree the decree-holder sought to attach the immovable properties of the judgment-debtor. The attachment was raised as the will under which the judgment-debtor derived his title did not disclose any such title to the properties as was specified in the execution petition. The order however observed that the decree-holder will have a right to attach and proceed against such interest as the judgment-debtor had in the properties under the terms of the will. The decree-holder then filed an Execution Petition praying for attachment and sale of the defendant's right in the immovable properties mentioned in the petition, which was described as being the right, title and interest possessed by the judgment-debtor under the terms of the will. Notice under Order 21, rule 66, was issued thrice and the last time it was served by substituted service. The terms of the sale proclamation were settled in the absence of the judgment-debtor. The judgment-debtor then filed an application contending that his interest could not be sold as under the will he had no powers of alienation.

Held, that (i) the petitioner is not barred by *res judicata* from pleading that the property is not liable to be sold by reason of the order in the prior execution petition, as the District Munsiff cancelled the attachment *in toto* and the observation in the order regarding the attachment of such rights as the judgment-debtor possessed under the will cannot be taken to be a definite finding or decision that such rights as he had were attachable.

(ii) The petitioner is not estopped from raising this contention by reason of the order in the second execution petition settling the terms of the sale proclamation, as clear notice that the validity of the execution was in question was not given and the party was advised only that the terms of the sale proclamation were about to be settled.

Chidambaram Chettiar v. Theivanai Ammal, (1923) 45 M.L.J. 346 : I.L.R. 46 Mad. 768 (F.B.) ; *Kaliyaperumal Naidu v. Subramanian Chettiar*, (1927) 27 L.W. 20 and *Adilakshmi Ammal v. Srinivasa Goundan*, (1944) 1 M.L.J. 36, followed.

Appeal against the order of the Court of the Subordinate Judge of Tinnevely in A. S. No. 17 of 1943 dated the 9th day of March, 1943 (E. A. No. 518 of 1942 in O.S. No. 236 of 1937 on the file of the District Munsiff's Court of Ambasamudram).

K. Venkateswaran for Appellant.

S. V. Rama Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The appeal arises out of proceedings in execution of the decree in O. S. No. 236 of 1937 on the file of the District Munsiff of Ambasamudram. It is a simple money-decree passed in a suit for recovery of money due on a promissory note. The first execution petition was filed in 1939 for attachment of the immovable properties of the appellant. On a petition filed by the judgment-debtor the attachment was cancelled as the will under which the judgment-debtor derived his title to the properties did not disclose any such right as was specified in the execution petition. The attachment, therefore, was withdrawn. There was an observation that the decree-holder will have a right to attach and proceed against such interest as the judgment-debtor had in these properties under the terms of Ex. A. That was only an observation. Nothing further was done on that execution petition, and the next petition was filed in 1941 out of the proceedings in which this appeal arises. The prayer was for attachment and sale of the defendant's right in the immovables mentioned in the petition, and the right was described as being the right, title and interest possessed by the judgment-debtor under the terms of the will. The attachment was ordered on the 16th October. Some of the properties were attached and items 53 and 97 to 108 were not attached. The rest were attached on 4th November, 1941, 5th November, 1941, and 6th November, 1941. The sale papers and revenue extracts were called for and time was extended twice, and it was finally posted to 15th January, 1942, for filing the papers. After the sale papers were returned, attachments over items 20, 35, 36, 38, 40 to 42, 45, 57, 91, 109 to 111, 114, 115, 117, 178, 182, 196, 198 were raised, and notice under Order 21, rule 66 was ordered. The defendant was not served, and the notice was affixed as the defendant was reported to have gone to Madura. The fresh notice was also affixed, as it was returned that he had gone to Nagercoil, and substituted service was ordered, and it was served by affixture at the last known place of residence. Then, on 2nd June, 1942, the date fixed for settling of the sale proclamation, the defendant was absent and the properties were directed to be sold on 24th July, 1942. The proclamation was settled that day. Upset price was fixed after considering the value given by the plaintiff and that given by the amin. On 23rd July, 1942, the judgment-debtor filed an application, E. A. No. 518 of 1942, for raising the attachment on the ground that the interest possessed by the judgment-debtor cannot be sold in execution of the decree as under the will he had no powers of alienation. The decree-holder opposed the application and contended that the petitioner was barred by *res judicata* from setting up this defence by reason of the fact that in the previous application it had been decided that the interest could be sold and also on the ground that he failed to take the necessary objections at the time when the sale proclamation was settled in spite of the fact that he had notice of it. The first Court accepting the contentions dismissed the petition. The learned Subordinate Judge of Tinnevely on appeal held that the petitioner not having objected to it at the time of settling of the proclamation was barred from raising the plea relying upon the decision of this Court in *Maharajah of Cochin v. Thupran*¹. Hence this appeal.

The only two points for consideration, therefore, are (1) whether the petitioner is barred by *res judicata* from pleading that the property is not liable to be sold by reason of the order in E. A. No. 465 of 1940, and (2) whether he is estopped from

raising this contention by reason of the order dated 2nd June, 1942, in E. P. No. 435 of 1941.

Point No. 1: The first Court held that in view of an observation in the order dated 18th September, 1940, in E. A. No. 465 of 1940, the judgment-debtor is estopped from setting up a plea that the interest which he had under the will is not saleable. In that order, the attachment already effected was withdrawn, but there was the following observation:

"It is proper to observe that the decree-holder will have the right to attach and proceed against the interest of the judgment-debtor in these properties such rights as are provided for in Ex. A."

The appellate Court has not discussed how far this order would operate as *res judicata*, but seeing that the order in that petition cancelled the attachment, the observations were only by way of *obiter dicta* and cannot be taken to be a decision on the point. The District Munsiff cancelled the attachment *in toto*. The observation regarding attachment of such rights as he possessed cannot be taken to amount to a definite finding or decision that such rights as he had were attachable. The necessity for deciding it would come only after there is a prayer for attaching that right. So that order cannot operate as *res judicata*. The necessity for deciding this question arose only when E. P. No. 435 of 1941 was filed. The attachment was ordered after calling upon the decree-holder to produce the copy of the will, and in the endorsement representing the E. P., it was stated that the judgment-debtor had a life-interest in these properties and that such a right could be sold in execution, *vide* endorsement of return dated 8th October, 1941. Subsequently the order directing the attachment of the properties was passed on 16th October, 1941 and after attachment the sale papers were filed. Notice under Order 21, rule 66 was issued thrice and the last time it was served by substituted service. The learned Subordinate Judge observes that in the circumstances of the case, it was difficult to believe that the judgment-debtor had no knowledge of the execution proceedings at the time of the settlement of the proclamation of sale and that his case had not been reasonably made out. He therefore found that the judgment-debtor was aware of the attachment and had notice of the date fixed for the settlement of the proclamation of sale. This is a finding of fact binding upon this Court.

Then the next point for consideration is whether not having appeared in Court after he was made aware of the execution proceedings and after he was validly served with notice under Order 21, rule 66, it would be open to him to raise the objection that the properties could not be sold. Whatever might be said with regard to the order directing attachment which was passed without notice, the order passed on 2nd June, 1942, directing the sale of the properties clearly amounts to a finding that the properties were liable to be sold and could be sold in execution of the decree. That order therefore might operate as *res judicata* in which case the proper course for the judgment-debtor would be to file an appeal against the order directing the sale. As pointed out in *Maharajah of Cochin v. Thupran*¹, some of the matters decided by the Court in approving the sale proclamation are of course administrative only, but the question as to whether the decision of the Court would be final or not will depend upon the nature of the decision. The decision alleged to have been made in this case, the correctness of which is questioned, is the decision on the point whether the properties could be sold or not. The Court has necessarily to decide whether the property could be sold or not before it directs the sale of the properties. Though the question could be decided before an order for attachment could be made, still it must necessarily be decided at the time when the order directing the sale is passed. In this case, the will had been produced and the decree-holder's contention was that the right under the will was capable of being attached and sold, as is clear from the endorsement on the execution petition made at the time of its re-presentation and referred to above. It is contended that if the petitioner had knowledge of the execution proceedings and also had notice under Order 21, rule 66, as was found by the learned Subordinate Judge, then it was his duty to have come and opposed the claim of the decree-holder

to have an order directing the sale of the items passed. He did not do so, nor did he take the matter in appeal. That order, therefore, it is contended will operate as *res judicata*. For the appellant, it is contended on the strength of the decision of the Full Bench in *Chidambaram Chetti v. Theivanai Ammal*¹ that the fact that the appellant did not attend the Court at the hearing of the application to settle the terms of the sale proclamation could not estop him from disputing the liability of the property from being attached. No doubt in that case the objection raised by the judgment-debtor as regards the liability of the property to be attached was made after notice was issued under Order 21, rule 66 and he was absent on the date of the hearing. But then as pointed out by a Bench of this Court in *Kaliya-perumal Naidu v. Subramaniam Chettiar*², the question turns on the particular circumstances of each case, and this was emphasized in *Chidambaram Chetti v. Theivanai Ammal*¹. It was also pointed out in that case that a material consideration was whether clear notice that the validity of the execution was in question had been given to a party who was advised that the terms of the proclamation were about to be settled, and it was found that the party had no notice of attachment. Oldfield, J., remarked that failure to raise the question of ownership in the proclamation proceedings did not constitute *res judicata*. Schwabe, C.J., also observed that the decision in that case was confined to the particular facts of the case. In this case we have the definite finding of the lower appellate Court that the appellant, the judgment-debtor, was aware of the attachment and had notice of the date fixed for the settlement of the proclamation. In *Adilakshmi Ammal v. Srinivasa Goundan*³ also, Horwill, J., pointed out that the learned Judges in the Full Bench decision in *Chidambaram Chetti v. Theivanai Ammal*¹ were at pains to point out that their decision was limited to the facts of the case. Now, in this case, there is also this important fact, namely, that even in the prior execution petition, when the properties were sought to be sold the petitioner raised the objection about the attachment and on his application the attachment was cancelled with the observation that the right, title and interest which the judgment-debtor had under the will might be proceeded against by way of attachment.

Can it be said in this case that when the appellant received notice under Order 21, rule 66, he had any information as to what the properties were that were brought for sale? I have sent for the notice and I find the list of properties is not given in it. All that is stated therein is that the date had been fixed for settling the terms of the proclamation. The case is therefore on all fours with the case of the Full Bench in *Chidambaram Chetti v. Theivanai Ammal*¹ and following the decision in that case I find that the appellant is not barred by *res judicata* from raising the plea that the properties are not liable to be sold merely by reason of the fact that he failed to be present on the date of hearing fixed for settling the proclamation.

The appeal is allowed. The order of the lower appellate Court is set aside and the petition is remanded to the first Court for considering the question as to whether the properties are liable to be sold in execution or not and proceed with the petition.

The costs of this appeal as also the costs of the lower appellate Court will follow and abide the final result of the execution petition.

V.P.S.

Petition remanded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Munaganoori Ramayya (died) and others

.. Appellants*

v.

Idamakanty Veerabhadrachari and another

.. Respondents.

Limitation Act (IX of 1908), section 7—Daughter's sons of the last male holder, a Hindu—Alienation by limited owner—Suit by the daughter's sons to set aside alienation—Limitation.

1. (1923) 45 M.L.J. 346 : I.L.R. 46 Mad. 768 (F.B.).

2. (1927) 27 L.W. 20 at 22.

3. (1944) 1 M.L.J. 36.

* S. A. No. 164 of 1943.

25th July, 1944.

Two sons of a daughter of the last male holder filed a suit to set aside an alienation made by the limited owner. The elder of the two brothers attained majority more than three years before the suit while the younger remained a minor. On the question whether the suit is barred by limitation,

Held, that the property in question not being coparcenary property in the strict sense of the term under the Hindu law, the elder brother is not a person entitled to give a valid discharge on behalf of the younger brother; hence the suit was clearly in time as regards the latter.

Held, further, that even as regards the elder brother, time does not begin to run until all the persons entitled to sue become majors, the case being one of several persons jointly entitled to institute a suit.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool, dated 15th September, 1942, in A. S. No. 25 of 1942, preferred against the decree of the Court of the District Munsiff of Markapur in O. S. No. 566 of 1936.

W. Kodandaramayya for Appellants.

P. C. Parthasarathy Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—Two sons of a daughter of the last male holder filed the suit out of which this appeal arises for setting aside an alienation made by the limited owner and for recovery of possession. The elder of the two attained majority more than three years before suit, but the younger was a minor until within three years before the suit. The question is whether the suit is barred by limitation either as regards both or at least as regards the elder.

The learned advocate for the defendants-appellants contends that the right which the plaintiffs seek to enforce in this suit is not a joint right within section 7 of the Limitation Act. It is also said that the elder of them could give a discharge on behalf of the younger. The last point may be taken up first. The property in question devolved on the two grandsons with mutual rights of survivorship as held by the Judicial Committee in *Venkayamm & Garu v. Venkataramanayamma*¹. But as the Judicial Committee explained the position in the later decision in *Muhammad Husein Khan v. Kishva Nandan Sahai*², the right which descends to a daughter's son is not such as would enable a son of the latter to claim a right by birth in it. If there are two sons of one daughter, the effect of the later decision is that though the two sons may take the property with rights of survivorship, it is not coparcenary property in the strict limited sense in which it is used under the Hindu law. It is only with respect to coparcenary property that the elder becomes the manager under the Hindu law and is therefore entitled to give a valid discharge on behalf of the younger brother. The property in question not being coparcenary property under the Hindu law, the elder brother is not entitled to give a valid discharge on behalf of the younger. The suit is therefore clearly in time as regards the younger one.

As regards the other member, I am of opinion that this is a case of several persons being jointly entitled to institute a suit. The two sons of a daughter take the property with mutual rights of survivorship as decided by the earlier of the two decisions just referred to. If there is a mutual right of survivorship, it is strictly a case of joint tenancy. A case of joint tenancy is clearly covered by the expression "one of several persons jointly entitled to institute a suit." The right itself is joint. In the absence of a partition or other circumstances putting an end to the joint tenancy, the property will survive to the survivor. Under these circumstances, it is impossible to say that it is not a case of several persons being jointly entitled to institute a suit. I therefore hold that even as regards the elder, time does not begin to run until all the persons entitled to sue become majors.

The second appeal therefore fails and is dismissed with costs.

(No leave).

K.C.

Appeal dismissed.

1. (1902) 12 M.L.J. 299 : L.R. 29 I.A. 156 : I.L.R. 25 Mad. 678 (P.C.).

2. (1937) 2 M.L.J. 151 : L.R. I.A. 256 : I.L.R. (1937) All. 655 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

P. Srinivasa Rao

.. Petitioner.*

Madras Prevention of Adulteration Act (III of 1918), section 5—Ghee in a tin kept in a ghee shop found to be adulterated—Presumption that it was kept there for sale, is rebuttable—Evidence that it was kept for testing and no evidence that it was offered for sale—Conviction for offence punishable under section 5 (1) (a) and (b) unsustainable.

In a prosecution for an offence under section 5 (2) of the Madras Prevention of Adulteration Act, the presumption that any food found in the possession of a person who is in the habit of manufacturing or storing like articles for sale has been manufactured or stored by such person for sale, can be rebutted. Accordingly where in respect of a tin of adulterated ghee kept in a shop there is evidence that it was kept there for test and not for sale and there is no evidence that the ghee was offered for sale the shop-keeper cannot be found to be guilty of any offence punishable under section 5 (1) (a) and (b) of the Madras Prevention of Adulteration Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Second Presidency Magistrate of the Court of the Presidency Magistrates, G. T., Madras, in M. C. No. 241 of 1943, dated 18th September, 1943.

V. *Rajagopala Mudaliar* for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The petitioner was convicted by the Second Presidency Magistrate of Madras for an offence punishable under section 5 (1) (c) and (b) of the Madras Prevention of Adulteration Act read with rules 28 and 29 of the Madras Prevention of Adulteration Rules of 1932 and sentenced to pay a fine of Rs. 200 with simple imprisonment for four months in default. In the charge sheet that was laid by the Corporation it was stated that on the 30th March, 1943, the petitioner stored and offered for sale food described as ghee which was not of the nature of substance or quality which it purported or was represented to be for the reason that it contained an admixture of 80 per cent. of foreign fat and thereby committed an offence punishable under section 5 (1) (a) and (b). The Magistrate found him guilty under that section on the evidence of P. W. 1 the Inspector. There is absolutely no evidence to show that the petitioner offered for sale that ghee. The only evidence is that the ghee was kept in a tin which was in the shop of the petitioner. According to P. W. 1 when he entered the shop he found two tins. He selected the particular tin which was in the rear and wanted a sample of the same. The petitioner was not in the shop then. There was there then only his servant. The master came subsequently and the ghee was taken from that tin. According to the petitioner's case, the ghee in that tin was not for sale. He says that he told the Inspector so and that it was kept there only for test and that there was a label to show that it was not for sale. P. W. 1 stated that the petitioner had a slip of paper in his hand and that he showed it to him and that the slip shown to him purported to indicate that the contents of the tin were not for sale. He added in cross-examination that the tin from which he took the sample was by the side of a chair which was adjoining the rear wall of the shop. It is urged by the learned Crown Prosecutor that under section 5 (2) of the Act that in every prosecution for an offence against this section, the Court may presume that any food found in the possession of a person who is in the habit of manufacturing or storing like articles for sale, has been manufactured or stored by such person for sale. It is not an irrebuttable presumption. It can be rebutted. In this case it has been rebutted by the fact that even at the time when the Inspector came it was mentioned to him that the ghee was not for sale and that it was kept in the rear of the shop near the chair adjoining the rear wall. In

Ex. A which was obtained by the Health Inspector from the petitioner at the time of the taking of the sample it was stated "This ghee under test. Now not for sale. After test it is for sale. There is a label on the tin." So even in the receipt obtained from the petitioner at the time of the taking of the sample it was mentioned to the knowledge of the Inspector that there was a label on the tin. It does not appear that he objected to the statement of that fact in the receipt. Now in Court he stated that there was no label on the tin. I do not think the Magistrate was justified in accepting this statement of the witness in the face of what is stated in Ex. A. The petitioner had stated even at the time that the tin was not for sale and had a label that it was not for sale. I therefore do not think it ought to be presumed that the ghee that was kept in the tin was offered for sale or stored for sale. Since there is no evidence that the ghee was offered for sale and since in the circumstances of the case it could not be presumed that that ghee was stored there for sale, the petitioner could not be found guilty of any offence punishable under section 5 (1) (a) and (b) of the Madras Prevention of Adulteration Act. I set aside the conviction and sentence and acquit the petitioner.

K.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Kontam Hampiah and other

.. *Petitioners.**

Criminal Procedure Code (V of 1898), sections 112, 114 and 117 (3)—Scope—Appearance of counter-petitioners—Procedure—Taking of preliminary bonds—Order regarding custody.

Section 114, Criminal Procedure Code, is applicable only to the stage prior to the service of the preliminary order under section 112 of the Code, and it can have no application as a preventive measure after the counter-petitioners have appeared in order to show cause. If speedy remedy is considered desirable after appearance has been entered, preliminary bonds can be taken under section 117 (3) of the Code; and pending their completion, the counter-petitioners can be held in custody or in default of execution they can be kept in custody until the inquiry is completed.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the District Magistrate of Bellary in his letter dated 29th May, 1944.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This reference by the learned District Magistrate of Bellary arises out of an order for arrest directed by the Sub-Divisional Magistrate of Adoni under section 114 of the Code of Criminal Procedure. As the learned District Magistrate has pointed out in his order of reference, this section is applicable only to the stage prior to the service of the preliminary order under section 112 of the Code and it can have no application as a preventive measure after the counter-petitioners have appeared in order to show cause. If speedy remedy is considered desirable after appearance has been entered, there is section 117 (3) under which preliminary bonds can be taken, as they have been taken in this case, and pending their completion the counter-petitioners can be held in custody, or in default of execution they can be kept in custody until the inquiry is completed. The order of the Sub-Divisional Magistrate is clearly without jurisdiction and is ordered to be set aside. As the learned District Magistrate has already enlarged the counter-petitioners on bail no further orders in this respect are necessary.

B.V.V:

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI,
Karri Sitaramiah and others

.. Petitioners*.

v.

Venkadaru Sarvayya Dubacherla and others

.. Respondents.

Civil Procedure Code (V of 1908), section 151—Order 41, rule 21—Application for excusing delay in setting aside an ex parte decree passed in appeal—Limitation Act (IX of 1908), section 5 and Article 169—Section 5 not applicable to applications under Order 41, rule 21.

It is settled so far as the Madras High Court is concerned, that the inherent power of the Court under section 151, Civil Procedure Code cannot be utilised to take the place of an express provision extending section 5 of the Limitation Act to an application, under Order 41, rule 21 of the Civil Procedure Code, to excuse the delay in seeking to set aside an *ex parte* decree passed in appeal.

It is a matter for consideration whether it is desirable to frame a rule similar to sub-rule (2) of Order 41, rule 19 so as to make the provisions of section 5, Limitation Act applicable to applications under Order 41, rule 21.

Petition praying that in the circumstances stated in the affidavit filed with S. R. No. 9543 of 1944, the High Court will be pleased to excuse the delay in filing S. R. No. 9543 of 1944, petition to set aside the *ex parte* decree passed on 2nd December 1943 in Appeal No. 169 of 1941 preferred to the High Court against the decree of the Sub-Court of Ellore in O. S. No. 19 of 1939.

V. Suryanarayana for Petitioners.

V. Rangachari, for 1st Respondent.

T. Ramamurti for advocate and court guardian for 2 to 4 Respondents.

The Order of the Court was made by

Wadsworth, J.—This is an application to excuse the delay in seeking to set aside the *ex parte* decree passed in A. S. No. 169 of 1941 on 2nd December, 1943. The applicants were respondents 1 to 9 and 12 in the appeal. In the appeal there were fourteen respondents, three of whom were actually represented by an advocate who was appointed guardian *ad litem* by the Court. The present applicants entrusted their case to Mr. Srikantiah, an advocate of this Court. He did not appear when the appeal was heard and judgment was pronounced after hearing the court guardian appearing for the minor respondents. According to the contentions in the affidavit of the applicants, they came to know on 14th February, 1944, when execution was being taken out, that the High Court had passed a decree in the appeal. On 18th February, one of them came to Madras to make enquiries from Mr. Srikantiah and found that he had left Madras one year previously and given up practice and that his whereabouts were not known. We are informed that the gentleman is now on military service. The present application to excuse the delay was presented on 20th March, 1944, and the question is whether such an application lies as a matter of law, assuming the allegations of the petitioners to be correct.

Under Order 41, rule 21, of the Civil Procedure Code where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the appellate Court to rehear the appeal, but must satisfy the Court either that notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. It is conceded in the present case that notice was duly served and although an attempt has been made to suggest that the words "he was prevented by sufficient cause from appearing" applied only to the party himself and not to the advocate who represents him in the appeal, we find it difficult to accept this contention. Under Article 169 of the Limitation Act the period fixed for an application for the rehearing of an appeal heard *ex parte* is thirty days from the date of the decree in appeal when notice of appeal has been served. Section 5 of the Limitation Act permits an extension of time for filing applications only if this section has been made applicable to such applications by or under any enactment. It is conceded that there is no enactment extending the provisions of section 5 of Limitation Act to applications under Order 41, rule 21, although a rule has been framed by this High Court extending the provisions of

section 5 to the somewhat similar applications under rule 19 of Order 41. It seems to be settled so far as this High Court is concerned by the decision in *Krishnaswami v. Changalraya*¹, that the inherent powers of the Court under section 151 of the Civil Procedure Code cannot be utilised to take the place of an express provision extending section 5 of the Limitation Act to an application of this kind. The result seems to be that there is no provision of law under which the prayer in this petition can be granted. It is a matter for consideration whether it is desirable to frame a rule similar to sub-rule (2) of rule 19 of Order 41, so as to make the provisions of section 5 of the Limitation Act applicable to a petition under rule 21 of Order 41. In the absence of any such rule we have no option but to dismiss this application with costs.

K.C.

Application rejected.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

P. K. Chinnaswami

*Appellant**

v.

C. Doctor and Co., Textile and Air Conditioning Engineers, 41-A, Bruce Street, Bombay Fort, by its managing proprietor, Mr. Vadilal. *Respondent.*

Contract—Agency—Introduction of prospective buyer resulting in contract for supply of goods—Undertaking to pay commission of fixed amount “after expiry and conclusion of the business”—No right to the amount unless contract is completed by acceptance of and payment for the goods.

As a result of the plaintiff's introducing to the defendant a customer, a contract for the supply of two sets of machinery to the customer was entered into and the defendant wrote to the plaintiff a letter undertaking to pay a sum of Rs. 6,000 “after the satisfactory expiry and conclusion of the business”. Subsequently as the customer was not in a position to pay for the two sets of machinery, as the result of further negotiations a fresh contract for the supply of only one set of machinery was entered into and that contract was duly fulfilled. In a claim by the plaintiff for the Rs. 6,000 according to the defendant's undertaking, a decree for Rs. 3,000 in respect of the second contract was given. On appeal, the plaintiff contended that as a contract for the supply of two sets of machinery was entered into as a result of the introduction by him, he was entitled to the full amount of Rs. 6,000.

Held, that the words “after the expiry and conclusion of the business” mean payment only on the completion of the contract which would only take place after the goods had been shipped and the buyers had paid for them against delivery of the shipping documents, or of the goods. As that contract was not fulfilled, the plaintiff by reason of his own contract of agency was not entitled to the Rs. 6,000.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 198 of 1940.

K. V. Ramachandra Aiyar and S. Thiyagaraja Aiyar for Appellant.

S. Panchapagesa Sastri and P. S. Ramachandran for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The plaintiff in this suit is a commission agent. In 1937 and 1938 the defendants were acting as the agents of a German firm named Rich Hartmann, whose business was the manufacture of cotton machinery at Chemnitz in Germany. The defendants employed the plaintiff to introduce them to the management of the Kumaran Mills, Ltd., a company carrying on business at Coimbatore. As the result of the plaintiff's introduction to the management of the Kumaran Mills, Ltd., a contract was entered into under which the firm of Rich Hartmann were to sell and the Kumaran Mills, Ltd., were to buy two sets of cotton spinning machinery at the price of £ 24,400 packed and delivered F.O.B. Hamburg. The contract further provided that confirmation should be obtained from the manufacturers, on which event the buyers were to pay to the defendants Rs. 25,000 and the balance of the £ 24,400 against delivery of the shipping documents. On the same day (the 30th November, 1937) the defendants' manager wrote to the plaintiff this letter—

1. (1923) 45 M.L.J. 813 : I.L.R. 47 Mad. 171.

"Allow me to tender my heartfelt thanks for your valuable assistance in my booking the order for Messrs. Kumaran Mills, Ltd., and as a token of my appreciation, I hereby undertake to pay a sum of Rs. 6,000 (Rupees six thousand) after the satisfactory expiry and conclusion of the Kumaran business."

The next day Kumaran Mills, Ltd., deposited with the defendants Rs. 10,000 on account of the Rs. 25,000 which was to be paid on confirmation of the contract being received from the manufacturers. The confirmation was in fact received on the 17th February, 1938. On the 4th March, 1938, the buyers made a further payment of Rs. 5,000. They did not pay the balance of Rs. 10,000 and apparently were not in a position to do so. As the result of further negotiations a fresh contract was entered into, under which the manufacturers were to supply only one set of cotton spinning machinery, the price being £ 12,873-10-0. This contract was fulfilled.

The plaintiff then instituted a suit in the Court of the Subordinate Judge of Coimbatore to recover the sum of Rs. 6,000 which he alleged he was entitled to under the letter written to him by the defendants on the 30th November, 1937. The Subordinate Judge held that as the original contract had not been fulfilled he was not entitled to Rs. 6,000, but he gave him a decree for Rs. 3,000 in respect of the second contract. This amount was based on the fact that the second contract represented only half the value of the first contract. The plaintiff has appealed. He says that inasmuch as he introduced the defendants to the Kumaran Mills Ltd., and a contract for the supply of two sets of cotton spinning machinery was entered into, he is entitled to the full amount of Rs. 6,000. The defendants resist this claim. They say that the words "after the satisfactory expiry and conclusion of the Kumaran business" must be construed as meaning that he was to get the Rs. 6,000 only in the event of the first contract being carried through, that is, delivery of the machinery by the manufacturers and payment for it by Kumaran Mills, Ltd. The defendants have not in this Court challenged the correctness of the Subordinate Judge's finding that they are liable for Rs. 3,000.

Before examining the meaning to be attached to the words "after the satisfactory expiry and conclusion of the Kumaran business," we will refer to certain of the authorities which have been quoted in the course of the arguments, as these are helpful. In *Luxor (Estbourne) Ltd. v. Cooper*¹, Viscount Simon, L.C. discussed the various classes of cases relating to the remuneration of commission agents. The first class is that in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. The second class is that in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and expends money and time in endeavouring to carry it out. The third class is that where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. The plaintiff contends that this case falls within the first class. The defendants contend that it falls within the third category. If the case falls within the first class, there can be no doubt that the plaintiff will be entitled to succeed in the appeal, but otherwise, if it falls within the third class. The Privy Council pointed out in the recent case of *Valarshak Seth Apcar v. Standard Coal Co., Ltd.*², that a broker who is employed by a seller to introduce him to a prospective purchaser is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from the introduction. This statement of the law, of course, implies that there is no contract to the contrary. If the case falls within the third category, the plaintiff must fail because the authorities show that the word "completion" must be taken to mean the performance of the contract, that is, the delivery of the goods and the payment for them.

1. (1941) A.C. 108.

2. (1943) 2 M.L.J. 405.

In *Chapman v. Winson*¹, the contract between the principal and the commission agent was couched in these terms :

"If your friend is named and introduced within one week, and becomes the purchaser of the above hotel, you shall be paid as and by way of commission a sum of £ 50 when and if the purchase is completed by private treaty."

The Court of Appeal, reversing the decision of the Divisional Court, held that the word "completed" meant completed in the legal sense by the payment of the purchase money. The buyer did not pay the purchase money and the contract fell through. Consequently it was held that the agent was not entitled to the commission. Collins, M.R., said, that the word "completed" meant an introduction and agreement resulting in completion, which involved the payment of the purchase money. The judgment in that case is in accordance with the judgment of the Court of Appeal in *Rattams v. Tompkins*² and *Lott v. Outhwaite*³.

In *Martin v. Perry and Daw*⁴, the plaintiff engaged the defendants as agents to find a purchaser for his business, commission being payable "on a sale being effected." The purchaser did not complete the contract. It was there held that a sale is not effected unless (a) one introduces a purchaser who pursues the matter to completion, or (b) one introduces a purchaser who at all times and at the proper time is ready, able and willing to execute the contract into which he enters.

It follows that if the words "after the satisfactory expiry and conclusion of the Kumaran business" contained in the letter of the 30th November, 1937, mean payment only on the completion of the contract, the plaintiff is not entitled to the balance of Rs. 3,000. In our opinion, this is the only meaning which can reasonably be given to these words. "The Kumaran Business" was the contract which the Kumaran Mills, Ltd., had entered into with the agents of the firm of Rich Hartmann, to buy two sets of cotton spinning machinery at the price of £ 24,400, and the "satisfactory expiry and conclusion" of that contract would only take place after the goods had been shipped and the buyers had paid for them against delivery of the shipping documents, or of the goods. As that contract was not fulfilled, the plaintiff by reason of his own contract of agency was not entitled to the Rs. 6,000.

The appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

Arumughathammal

*Appellant**

v.

Seth Mangoomal Lunida Singh Firm through its managing partner and agent, Jethanand and another

Respondents.

* Civil Procedure Code (V of 1908), Order 21, rule 89—Proper deposit under—Sale of properties in different lots—Applicant interested in one lot only—Deposit of sale price of that lot only and also the 5 per cent. thereon—Not sufficient compliance with the provisions of Order 21, rule 89—Auction purchaser can object to inadequacy of deposit though decree-holder may not object.

An applicant under Order 21, rule 89, Civil Procedure Code was interested in only one of the several lots in which the properties of the judgment-debtor were sold in execution of a decree against him. She deposited the sale price of that particular lot and also the five per cent. thereon. Though the decree-holder had no objection to the sale being set aside, the auction purchaser of that lot opposed the application on the ground that the amount specified in the proclamation of sale had not been deposited. On a contention that it was not open to him to raise such an objection,

Held, that the moment a property is sold in auction, the auction purchaser gets the right to the properties subject to this, namely, that the sale shall not be set aside by the Court except when the terms of Order 21, rule 89 are strictly complied with and deposits of the sums of money required by the Code are made into Court. If the conditions laid down in that rule are not complied with the auction purchaser has an indefeasible right to the property. In the present case, those provisions had not been complied with and the applicant was therefore not entitled to have the sale set aside.

1. 91 L. T. 17.

2. 8 T.L.R. 707.

* A. A. O. No. 462 of 1943.

3. 10 T.L.R. 76.

4. (1931) 2 K.B. 310.

Appeal against the order of the Court of the Subordinate Judge of Madura in E. A. No. 289 of 1933 in O. S. No. 114 of 1931.

C. S. Venkatachariar, D. Ramaswami Aiyangar and S. Kuppuswami for Appellant.

K. S. Rajagopala Aiyangar and N. S. Srinivasan for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was the purchaser of a certain property which was brought for sale in execution of a mortgage decree. There were several lots and one of them, lot 9, was purchased by the petitioner. The second respondent purchased that lot in Court auction for Rs. 480 on the 15th March, 1943. Within a month from the date of that sale, the petitioner who purchased the property, according to her, under the impression that it was unencumbered, found that it was sold at the instance of a decree-holder who had obtained a decree on a mortgage executed prior to her sale, and in order to save the property filed the petition out of which this appeal arises. She deposited five per cent. of the purchase money for this lot as she was interested only in it, as also the price for which the property was sold in Court auction. When notice was issued to the decree-holder as well as the auction purchaser, the decree-holder stated that he had no objection to the petition, but the auction purchaser opposed it on the ground that the money that ought to have been deposited as per the terms of Order 21, rule 89 of the Civil Procedure Code had not been deposited. Under that rule it is the entire amount due under the decree that had to be deposited in addition to the five per cent. As the amount deposited by the petitioner was not the entire amount due under the decree but only the amount realised by the sale of the one lot in which she is interested, he pleaded that the petitioner was not entitled to the relief claimed. The learned Subordinate Judge of Madura dismissed the petition on the ground that the entire amount required by Order 21, rule 89 to be deposited had not been deposited.

It is urged for the petitioners before me that under the terms of Order 21, rule 89, the petitioner had no doubt to deposit, for payment to the purchaser a sum equal to five per cent. of the purchase money and for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of that proclamation of sale, have been recovered by the decree-holder; but since the payment of the latter amount, that is, the amount specified in the proclamation of sale, was for the benefit of the decree-holder and as in this case the decree-holder had no objection to the petition being ordered, it will not be open to the purchaser to oppose the petition on the ground that the correct amount payable to the decree-holder had not been paid into Court. The question for consideration therefore is whether it is not open to the purchaser to insist on the provisions of the rule being strictly complied with and to oppose the grant of the remedy to the petitioner if it had not been so complied with. In this case it was only after the petition was filed and after notice had gone to the decree-holder which was nearly three months after the sale that the decree-holder stated that he had no objection to the petition, and to the sale being set aside. If the decree-holder received the amount due to him on a date later than thirty days after the sale, will it be open to the Court to set aside the sale merely because he has no objection? The moment a property is sold in auction, the auction purchaser gets the right to the properties subject to this, namely that the sale shall not be set aside by the Court except when the terms of Order 21, rule 89 are strictly complied with and deposits of the sums of money required by the Code are made into Court. If the conditions laid down in that rule are not complied with the auction purchaser has an indefeasible right to the property. And those provisions have not been complied with in this case by the petitioner.

It is next stated for the appellant that, if the auction purchaser is not anxious to get the five per cent. of the purchase money, it will not be open to the decree-

holder to oppose a petition for setting aside the sale. I am not sure if this is correct in view of the conditions laid down in the rule.

In these circumstances I think the Subordinate Judge was justified in finding that, inasmuch as the petitioner has not fulfilled the conditions provided in Order 21, rule 8g, he is not entitled to have the sale set aside. The appeal fails and is dismissed with costs of the second respondent.

V.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Gadiraju Lakshmipathiraju, minor by natural father and next friend

Gadiraju Venkatapathi Raju

Appellant.*

v.

Gadiraju Sithayya and others

Respondents.

Registration Act (XVI of 1908), section 32—Deed by Hindu adoptive father acknowledging adoption—Widow denying adoption—Right of natural father as representative of minor adoptee to present the deed for registration.

Where a Hindu widow contends that an alleged adoption by her husband never took place and that she is not the adoptive mother, it would be monstrous if the minor adopted son who has been lawfully adopted could be defeated by his adoptive mother denying for selfish reasons the truth of the adoption and refusing to present the deed of adoption executed by her husband for registration. In such circumstances, the presentation for registration by the natural father of the minor would be in accordance with law. It is not necessary that such presentation must be by the nearest agnate. The presentation must be by some one closely related to the minor and one whom the Court would appoint to be his lawful guardian should an application be made for that purpose.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Narsapur, in O. S. No. 25 of 1942.

V. Govindarajachari and P. Satyanarayana Raju for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from a decree of the Subordinate Judge of West Godavari dismissing a suit on a preliminary issue. The suit was instituted by the appellant, through his natural father, Venkatapathi Raju, as his next friend. The appellant's case was that on the 4th May, 1941, he had been adopted by one Surappa Raju, who on the same day executed a deed acknowledging the adoption. Surappa Raju died the following day. He was survived by his widow (the first respondent) and by his brother (the third respondent). On the 26th June, 1941, the natural father of the appellant presented the deed of adoption for registration. As the adoption created an interest in immovable property registration was necessary. The presentation by the natural father of the deed for registration was concurred in by the third respondent, the nearest agnate of the appellant, assuming, of course, that he had been lawfully adopted by Surappa Raju. The widow disputed the legality of the adoption and wrote a letter to the Sub-Registrar objecting to the registration of the deed. She did not appear before the Sub-Registrar, but her letter proved to be sufficient to induce the Sub-Registrar to refuse to register the deed. The appellant then appealed to the District Registrar, who held that the presentation of the document was valid; but he was not satisfied on the evidence that Surappa Raju had executed the deed. On this latter ground he rejected the appeal. The consequence was that the appellant filed the present suit under the provisions of section 77 of the Registration Act.

Two preliminary issues were framed, namely:—(1) Whether the suit was barred by limitation, and (2) whether the document was validly presented for registration. The Subordinate Judge decided the first issue in favour of the appellant, and it is not disputed that he was right in so doing. He decided the second

question against the appellant and consequently dismissed the suit. Hence the appeal.

In holding that there had been no valid presentation of the document for registration the Subordinate Judge relied on the decision of this Court in *Narayana Reddy v. Audilakshmi Ammal*¹, and was of the opinion that the judgment of the Privy Council in *Venkatappayya v. Venkataranga Rao*², in no way affected it. The Subordinate Judge did not, however, consider the judgment of the Full Bench of this Court which decided *Subbarama Reddy v. Subba Reddy*³, where the judgments of the Judicial Committee in *Amba alias Padmavathi v. Shrinivasa Kamathi*⁴ and *Venkatappayya v. Venkataranga Rao*² were discussed. In *Amba alias Padmavathi v. Shrinivasa Kamathi*⁴, their Lordships held that there had not been a valid presentation for registration of a deed in favour of a minor. The presentation was made by her father. The minor was married and on her marriage her father ceased to be her guardian. Her husband took his place. In *Venkatappayya v. Venkata Ranga Rao*², their Lordships had to consider the question whether a deed of adoption had been validly presented for registration when the presentation was made by the natural father of the adopted boy. The adoptive father was dead and the natural father was the nearest male agnate of the minor. In this case their Lordships drew a distinction between a representative within the meaning of section 32 of the Registration Act and a guardian. They indicated that the word "representative" had a wider significance than the word "guardian." The word "representative" includes a "guardian," but it could include others. As the father of the minor in that case was the nearest male agnate and the proper person to act as the natural guardian in the absence of a judicial appointment, their Lordships held that the presentation was in order. Their Lordships also observed that by section 41, the Registrar is made the judge whether the person presenting the authority is entitled to present it.

For the appellant it is said that the present case falls within *Venkatappayya v. Venkata Ranga Rao*². The first respondent says that it falls within *Amba alias Padmavathi v. Shrinivasa Kamathi*⁴. We do not agree that *Amba alias Padmavathi v. Shrinivasa Kamathi*⁴ applies here. It would perhaps apply if the first respondent were to be regarded as the lawful guardian of the appellant, but this is not the case. She herself denies the status of guardian. She says that the adoption never took place and that she is not the adoptive mother. It would be monstrous if in such circumstances a minor who has been lawfully adopted could be defeated by his adoptive mother denying, for selfish reasons, the truth of the adoption and refusing to present the deed for registration. That their Lordships never intended in *Amba alias Padmavathi v. Shrinivasa Kamathi*⁴, to go to this length is shown by their observations in *Venkatappayya v. Venkata Ranga Rao*². In delivering the judgment of the Board Lord Phillimore observed :—

"It is said that when adoption has once taken place, the adopted child is removed wholly out of his natural family, and that his natural father has no longer a legal relation to him. This may be taken to be the case; but what is to happen when a child of tender years, as was the case here, is actually residing with his natural father, and has no appointed guardian. When one remembers that the definition of representative does not make it equal to guardian, but says that it includes guardian, might it not well be said that in these circumstances and in the absence of any legally appointed guardian, the natural father was the representative."

This Court had occasion to draw attention to the importance of this passage in the Full Bench case of *Subbarama Reddy v. Subba Reddy*³.

The learned counsel for the first respondent says that in the present case the natural father of the appellant is not his nearest agnate and this takes the case out of *Subbarama Reddy v. Subba Reddy*³. We do not read the judgment of their Lordships in *Venkatappayya v. Venkata Ranga Rao*² as meaning that the presentation in such circumstances must be by the nearest agnate. The presentation must be by some one closely related to the minor and one whom the Court would appoint

1. (1928) 55 M.L.J. 102 : I.L.R. 51 Mad. 462.

462 (F.B.).

2. (1928) 56 M.L.J. 218 : L.R. 56 I.A. 21 : I.L.R. 52 Mad. 175 (P.C.).

4. (1921) 14 L.W. 573 : 26 C.W.N. 369. (P.C.).

3. (1943) 1 M.L.J. 272 : I.L.R. (1943) Mad.

to be his lawful guardian, should an application be made for that purpose. There can be no doubt in this case, to use the language of their Lordships in *Venkatappayya v. Venkata Ranga Rao*¹ that the natural father is the proper person to be appointed guardian and the proper person to act as the natural guardian in the absence of any judicial appointment. Moreover, the third respondent as the nearest male agnate was a consenting party to the presentation by the natural father. As we have already mentioned, their Lordships pointed out that by section 41, the Registrar is made the judge whether the person presenting the document is entitled to present it.

The District Registrar held that the presentation was properly made, and we consider that the case is governed by *Venkatappayya v. Venkata Ranga Rao*², which means that the presentation by the natural father of the adoption deed for registration was in accordance with law. It follows that the decision of the Subordinate Judge on this question must be reversed and that the case will be remanded to him to try in accordance with law the other issues raised in the case.

The appellant will have his costs and is entitled to a refund of the court-fee paid on the memorandum of appeal.

K.S.

Appeal allowed and case remanded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Kayakkool Pillati Krishnan Atiyoti, Karnavan and Manager of his Tarwad

*Appellant**

v.

Thayyullathil Moosa and others

Respondents

Malabar Tenancy Act (XIV of 1930) Section 41—Charge under for arrears of rent—Not available to an assignee of arrears of rent.

Section 41 of the Malabar Tenancy Act gives a charge to the landlord for arrears of rent and to no one else. An assignee of the arrears of rent is not a landlord and therefore is not entitled to the charge.

Swaminatha Iyer v. Ramanatha Iyer, (1943) 2 M.L.J. 24 and *Noroth Puthan Pura Kunhi Kannan v. Pulapatti Achu*, (1944) 1 M.L.J. 18 disapproved. *Unikorachanveetil Kunhipokker v. Thenamparath Panakkat Ananthan Nambiar*, A. No. 853 of 1943 approved. *Forbes v. Maharaj Bahadur Singh*, (1914) 27 M.L.J. 4; L.R. 41 I.A. 91; I.L.R. 41 Cal. 926 (P.C.) and *Vyrapperumal v. Alagabba* (1931) I.L.R. 55 Mad. 468 applied.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry in A. S. No. 292 of 1942, preferred against the decree of the Court of the District Munsiff, Badagara in O. S. No. 610 of 1941.

C. K. Viswanatha Aiyar for Appellant.

P. Govinda Menon for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—On the 6th December, 1940, the sixteenth defendant in this suit as the jenmi assigned to the seventeenth defendant the rent due for the eleven years from the 15th September, 1930, to the 15th September, 1941, from the kanomdar holding under a kanom demise dated the 29th December, 1922. On the 9th August, 1941, the assignee assigned his rights to the plaintiff, who instituted the suit in the Court of the District Munsiff of Badagara to recover the amount of rent due in respect of the eleven years. He claimed that he was entitled under section 41 of the Malabar Tenancy Act, 1929, to a charge for the amount. The District Munsiff held that the plaintiff was not entitled to a charge under that section but only to a money decree in respect of six years immediately preceding the suit. On an appeal filed by the plaintiff the Subordinate Judge disagreed with the judgment of the District Munsiff. He considered that the plaintiff was entitled to

1. (1928) 56 M.L.J. 218; L.R. 56 I.A. 21; I.L.R. 52 Mad. 175 (P.C.).

* S. A. No. 666 of 1943.

19th July, 1944.

a charge. Consequently he gave him a decree for the full amount claimed and declared that it constituted a charge on the property. The first defendant, who is the kanomdar, has appealed. The opinion of the Subordinate Judge is in accordance with the judgment of Somayya, J., in *Swaminatha Aiyar v. Ramanatha Aiyar*¹, which was followed by Horwill, J., in *Noroth Puthanpura Kunhi Kannan v. Pulappti Achu*². On the other hand the case for the appellant receives support from the judgment of Chandrasekhara Ayyar, J., in the unreported case of *Unikorachanveetil Kunhipokker v. Theniamprath Pahakkat Ananthan Nambiar* S. A. No. 853 of 1943. Chandrasekhara Ayyar, J., considered that the question is governed by the judgment of the Privy Council in *Forbes v. Maharaj Bahadur Singh*³ and the decision of this Court in *Vyraperumal v. Alagappa*⁴. Somayya, J., was of the opinion that these cases were not really in point. We prefer the view expressed by Chandrasekhara Ayyar, J.

Section 41 of the Malabar Tenancy Act reads as follows :

"Renewal fees and arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due in the holding in respect of which they are due as at the time of the creation of such interest, and such charge shall have priority over all other charges on the same except the charge for the revenue and any dues thereon payable to government or to a local authority and made a charge thereon by any law for the time being in force."

The case of *Forbes v. Maharaj Bahadur Singh*³, had reference to the Bengal Tenancy Act, 1885, section 65, of which says :

"Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

In *Forbes v. Maharaj Bahadur Singh*³, a Zamindar who had transferred his interest in the zamindari, brought a suit against the tenant for arrears of rent which had accrued due to him before the transfer. The question was whether the erstwhile landlord was entitled to a charge on the land in respect of unpaid rent. The Judicial Committee held that he was not entitled to a charge. In delivering the judgment of the Board, Mr. Ameer Ali, said :

"It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlord ; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A Zamindar to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own, the back-rents as he is entitled to do ; he may then sue for those back-rents ; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold ? The question admits of only one answer that it is the existing landlord alone who can execute the decree ; the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money decree, he has no remedy against the tenure itself."

Mr. Ameer Ali proceeded to say :

"The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt ; and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is to all intents and purposes, so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligation are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by section 65 is clearly in favour of the landlord."

Section 148 (h) of the Bengal Tenancy Act declares that notwithstanding anything contained in section 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him. There is no corresponding section in the Malabar Tenancy Act and consequently Somayya, J., thought that the judgment of their Lordships could not be applied when the question

1. (1943) 2 M.L.J. 24.

I.L.R. 41 Cal. 926 (P.C.).

2. (1944) 1 M.L.J. 18.

4. (1931) 62 M.L.J. 31 : I.L.R. 55, Mad.

3. (1914) 27 M.L.J. 4 : L.R. 41 I.A. 91 : 468.

was one of interpretation of section 41 of the Malabar Tenancy Act. The passages from the judgment which we have quoted are really based on the provisions of section 65 of the Bengal Tenancy Act. Their Lordships point out that the section creates a charge in favour of the landlord and that it would lead to a very anomalous position to hold that the ex-landlord as well as the present landlord were given a charge for arrears of rent. The same reasoning applies to section 41 of the Malabar Tenancy Act. The charge created is clearly in favour of the landlord. No one but he is mentioned. We cannot regard the absence of a section corresponding to section 148 (h) of the Bengal Tenancy Act as material. The plaintiff is not the landlord, and he has never held that position. He is merely the assignee of a debt.

Somayya, J., was also impressed by the fact that the Malabar Tenancy Act does not contain a section corresponding to section 128 of the Madras Estates Land Act which states that where in the execution of a decree, an order for sale has been passed, and a person who is interested in the land pays the amount due, he shall be entitled to a charge in respect thereof. Here again, we do not consider that the absence of such a provision in the Malabar Tenancy Act alters the position. The Legislature was providing for a charge in exceptional circumstances. If anything the insertion of section 128, in the Madras Estates Land Act makes the case for the appellant in the present case all the stronger.

In *Vyaperumal v. Alagappa*¹, this Court held that when one member of a joint family, in order to prevent arrest in execution of a decree obtained by the landlord against himself and another coparcener for arrears of rent due by both under the Madras Estates Land Act, pays the amount due, he is not entitled by virtue of sections 5 and 128 of that Act or under the general law or by virtue of sections 82 and 100 of the Transfer of Property Act to a first charge on the other coparcener's portion of the holding. It was pointed out that the charge created by section 5 of the Madras Estates Land Act only applies to a rent due to a landlord in that capacity and that section 128 only applies in the special circumstances contemplated by it. In holding that the charge created by section 5 is for the benefit of the landlord and applies to rent only so long as it is due to him, the Court expressly relied upon the judgment of the Judicial Committee in *Forbes v. Maharaj Bahadur Singh*². We consider that the judgment in *Vyaperumal v. Alagappa*¹ has direct bearing here. In fact the present case cannot be really distinguished.

We hold that section 41 of the Malabar Tenancy Act gives a charge to the landlord for arrears of rent and to no one else. The plaintiff is not a landlord and never was. Therefore all he is entitled to is a money decree.

It follows that the decision of the District Munsiff was right and the decree passed by him must be restored with costs here and before the Subordinate Judge.

K.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

The Revenue Divisional Officer and Land Acquisition Officer,
Tellicherry

*Appellant**

v.

The Valia Raja of Chirakkal Kovilagam and another

Respondents.

Land Acquisition Act (I of 1894), sections 18 to 28—Jurisdiction of the Court under—Limits and nature of—Order of District Judge remanding case to Collector for fresh enquiry—Non-appealability—Interference by High Court in revision.

The jurisdiction of the Court under sections 18 to 28 of the Land Acquisition Act is a jurisdiction to enquire into objections to the Collector's award and to make an award itself after hearing the relevant evidence. The Act does not empower the Court to remand the case to the Collector for fresh enquiry and for a further award.

1. (1931) 62 M.L.J. 31 : I.L.R. 55 Mad. 468. L.R. 41 Cal. 926 (P.C.).

2. (1914) 27 M.L.J. 4 : L.R. 41 I.A. 91 : I.

* A. A. O. No. 422 of 1943.

Though strictly speaking there is no right of appeal against the order of a District Judge declining to make an award, the order in the present case involves a material irregularity in the exercise of the special jurisdiction and therefore can be set aside in revision.

Appeal against the order of the District Court of North Malabar dated 1st February, 1943 and made in L. A. C. No. 300 of 1942.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

D. Ramaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The jurisdiction of the Court under sections 18 to 28 of the Land Acquisition Act is a jurisdiction for the Court to enquire into objections to the Collector's award and to make an award itself after hearing the relevant evidence. The Act does not empower the Court to remand the case to the Collector for fresh enquiry and for a further award. Strictly speaking there is no right of appeal against the order of the learned District Judge declining to make an award. But that order clearly involves a material irregularity in the exercise of the special jurisdiction. The appeal and the memorandum of cross-objections are dismissed but in revision, I set aside the order of the learned District Judge and direct him to hear the reference in full himself and pass an award in accordance with the law. No order is made as to costs here.

K.S.

Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sri Viziamam Gajapathiraj Bahadur, Raja of Vizianagaram, being
minor represented by his next friend, Estate Manager under
the Court of Wards

*Appellant**

v.

Sri Sri Sri Vikramadeo Varma, Maharaja of Jeypore

Respondent.

Court of Wards—Powers of—Grant of permanent lease of forest area—Stipulation for rent on basis of receipts—Provision for revision of rent—Validity of lease—Property partly within Agency Tracts and partly outside—Deed if compulsorily registrable—Registration Act (XVI of 1908), sections 17 and 49—Date of commencement of lease—Effect of section 110, Transfer of Property Act (IV of 1882)—Uncertainty as to date or amount of rent—Madras Court of Wards Act.

The plaintiff who was an impartible estate-holder represented by the Court of Wards sued for specific performance of an agreement of compromise entered into by the previous estate-holder with the defendant's predecessor in title who was then represented by the Court of Wards. The agreement which was entered into in settlement of all previous disputes provided that the plaintiff's predecessor should acknowledge the title of the defendant's predecessor in title to certain forest lands in the Agency Tracts while the latter was to acknowledge the title of the plaintiff to certain other forest lands outside the Agency Tracts. It further provided that the plaintiff was to have a permanent lease of the forest in the Agency Tracts on payment of a yearly rent which was to be one half of the net forest receipts realised in the first year with a provision for revision of the rent once in every ten years. It was also provided that the lease should commence after the survey of the area had been completed. There was a further clause that the Court of Wards thought that the compromise was for the advantage of the ward and for the benefit of the estate. Although the agreement was entered into in 1921 the survey was not completed till 1928. The suit was instituted in 1937 to enforce the agreement between the parties.

Held, that though the actual figure of the rent had not been determined there was no uncertainty regarding the way in which it should be fixed, that the lease should in the light of section 110 of the Transfer of Property Act be taken to run from the date on which it was executed and that it was not bad for uncertainty as to the amount of rent or to the date of the commencement of the lease.

Ukrumul Huq v. Wilkie, (1907) 17 M.L.J. 454 (P.C.) and *Kailash Chandra Bhomik v. Bejoy Kanta Lahiri Chowdhury*, (1915) 23 C.W.N. 190, considered.

Held, also that the arrangement whereby the permanent lease was granted of the forest area was within the powers of the Court of Wards and was binding on the defendant.

Where it is clear that there was an actual dispute the settlement of which was in the interests of the estate and that the dispute has been settled by a compromise which appeared to the Manager of the Court of Wards to be a fair arrangement having regard to the contentions of the parties it is not

open to the Court to nullify the compromise merely on the ground that one party derived a better bargain than the other.

Held further, that as the Registration Act did not apply to the Agency Tracts the agreement was not inadmissible in evidence for want of registration. And the clause in the deed which related to forest area outside the Agency Tracts was clearly separable, and it was open to the plaintiff to give up the benefit of the contract regarding that property and limit his remedy to the property within the Agency Tracts.

Hawksley v. Outram, (1892) 3 Ch. 359 and *Samuvier v. Ramasubbier*, (1931) 60 M.L.J. 527 : I.L.R. 55 Mad. 72, referred to.

Appeal against the decree of the Court of the Agency Subordinate Judge, Jeypore, dated 8th March, 1940, and passed in O. S. No. 10 of 1937.

S. Venkatesa Aiyangar for Appellant.

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*), *N. Rajagopala Aiyangar*, *M. Seshachalapathi* and *D. V. Reddi Pantulu* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal arises out of a suit for specific performance brought by the appellant, who is the Raja of Vizianagaram represented by the Manager under the Court of Wards, against the respondent, the Maharaja of Jeypore. The agreement which is sought to be enforced is a compromise of two alleged disputes regarding forest areas, one relating to the Gudepa forest in the plains and the other relating to the Samidha forest in the Agency. The agreement in substance provides that the appellant shall acknowledge the title of the respondent to the area in dispute in the Samidha forest and shall be given a permanent lease of that forest including the portions which have always been admittedly the property of the respondent, while as to the Gudepa forest the respondent is to acknowledge the title of the appellant. The suit has been dismissed on various grounds which will be enumerated hereafter.

The dispute has a long history which need only be summarised briefly. In the disputed areas the boundary between the estates of Vizianagaram and Madgole runs through forest. The precise location of the boundary was in dispute at the end of the last century. In 1899 Mr. Hatchell of the Madras Survey Department took up the dispute regarding the Samidha forest and fixed a boundary which is alleged to have given some six square miles hitherto treated as the property of Vizianagaram to the estate of Madgole. In 1901 there was a survey of the boundary in the Gudepa reserve which resulted in the recognition for the title of the Vizianagaram estate to some 750 acres of scrub jungle in the Gudepa area claimed by Madgole. We are mainly concerned in the present appeal with the Samidha block. It is fairly clear that though no appeal was preferred against Mr. Hatchell's decision, it was not accepted by the Vizianagaram estate. The documents exhibited show that the estate officials continued to assert the rights of the estate in the portion allotted to Madgole at the survey and it would also appear that the inhabitants of the villages affected by this decision resented their inclusion in the Madgole estate. In 1915, the Madgole estate was under the control of the Court of Wards and the Vizianagaram estate was being administered by Mr. Fowler as trustee under a settlement made by the late proprietor. At this time there were constant complaints from the Vizianagaram officials that the Madgole forest officers were issuing permits within the Vizianagaram boundary and that under cover of these permits the licensees were extracting timber from areas belonging to the Vizianagaram estate. It was also found that the administration of the Madgole forests adjacent to the Samidha forest was attended with difficulties owing to the fact that the only communications with these forests lay through the Vizianagaram estate. In these circumstances negotiations started between the Collector representing the Court of Wards which had charge of the Madgole estate and Mr. Fowler representing the Vizianagaram estate for a lease of the Madgole forests in the Samidha vicinity to the Vizianagaram estate. This lease appears to have been suggested as a counter-proposal to the claim by Vizianagaram that the Madgole permit stations should be located outside the Vizianagaram boundary in order to prevent illicit practices.

In 1916, the negotiations resulted in a definite proposal by the trustee of the Vizianagaram estate for a lease of the right to collect royalties on forest produce from the Madgole forests passing through the Samidha Valley. This correspondence seems to have led to the resuscitation of the dispute regarding the location of the boundary between the two estates in this area and in January, 1917, the Collector issued an order, Exhibit YYYYY-7 under the Survey and Boundaries Act stating that a dispute had arisen between the two estates regarding this boundary and referring the dispute under section 22 (a) of the Survey and Boundaries Act to the decision of the local Deputy Tahsildar. In August, 1918, the Sub-Collector, Narasapatam informed the Collector that there was every prospect of an amicable settlement of the dispute regarding the boundary, and in consequence thereof the proceedings of the Deputy Tahsildar were adjourned *sine die*. In October, 1918, under Ex. YYYYY the Collector reported to the Court of Wards that there was a dispute between the two estates, firstly regarding the Samidha forest in which the Madgole estate claimed the boundary as fixed by Mr. Hatchell, in 1899 and Vizianagaram contended that a large block included by Mr. Hatchell within the Madgole estate was really the property of Vizianagaram, and secondly with reference to the Gudepa forest in which Vizianagaram was contending for a boundary as fixed in the survey whereas Madgole was claiming a right to possession of a considerable area excluded from its limits in that survey. The Collector expresses the opinion that the two disputes would involve a costly litigation unless an amicable settlement could be reached and he submits for approval a general scheme of compromise whereunder the Madgole estate will admit the title of Vizianagaram to the whole of the Gudepa reserve surveyed as part of this estate in 1901, the Vizianagaram estate would withdraw its contentions that the title of the Madgole estate based on the 1899 survey was barred by adverse possession and would admit the title of the Madgole estate to the disputed area, in consideration of the Madgole estate granting a permanent lease not only of the disputed area, but also of the adjacent Madgole forests, on a yearly rent to be decided by the District Collector and the trustee in consultation with each other, but to be based on the average of the forest receipts for the past five years. The lease was to be subject to a condition of good forestry and the right of the Court of Wards to depute a senior forest officer to make regular inspections.

It will be noted that at this stage there was no very definite understanding as to the basis upon which rent should be calculated except that it would bear some relation to the five years' receipts. There was correspondence arising out of this proposal, the Court of Wards asking for details regarding the extents of forest involved and expressing a doubt regarding its power to grant a permanent lease. In the report of the Collector dated 28th January, 1919, the extent of the disputed area in the Samidha forest is given as $11\frac{1}{2}$ square miles. A good deal of emphasis has been laid in the lower Court on the increase in this area, when compared with the six square miles apparently in dispute at the time of Mr. Hatchell's survey. The learned Subordinate Judge has even gone so far as to suggest that the area in dispute in the Samidha forest was deliberately exaggerated in order to make it appear that the arrangement was beneficial to the Madgole estate under the administration of the Court of Wards. This is a very serious allegation to make against responsible officers of the Government who had no interest in the dispute other than their anxiety to improve the administration of the two estates and we have been unable to find any basis for the allegation. The only thing that appears is that the estimated area of the disputed portion in 1918, was nearly double the area alleged to have been wrongly assigned to Madgole in 1899; but it does appear that in the interval between 1899 and 1919 the Vizianagaram estate had been exercising alleged rights in the forests situated near the boundary of the two estates without much regard to the decision of 1899 and that Vizianagaram had rightly or wrongly been claiming a right by adverse possession to a very considerable area. That area was estimated by responsible officers on both sides at $11\frac{1}{2}$ square miles in 1918. It seems to us preposterous to suggest merely because of the difference between the area claimed by the Vizianagaram estate in 1918 and the area dis-

allowed by Vizianagaram in 1899 that the Collector representing not Vizianagaram but Madgole had deliberately inflated the claim of Vizianagaram in order to make his proposals for a compromise more acceptable to the Court of Wards.

The Court of Wards took the opinion of the Advocate-General on the question of its power to give a perpetual lease and as a result of further correspondence with the Collector an order was issued, Ex. CLXI (r) dated 12th October, 1920, in which the Court of Wards approved the suggestion that the agreement should contain a clause that the compromise was for the advantage of the Wards and for the benefit of the estate and a provision that the rent should be subject to revision every ten years and pointed out that nothing had yet been decided as to the rent and directed that the Collector was to settle with the trustee how the rent was to be calculated, if on net receipts, the principle on which the net amount was to be determined and the proportion of the net receipts to be paid as rent. All these points were to be settled and actually embodied in the deed of compromise and the final arrangement reported to the Court for approval. As a result of this order there was correspondence between the Collector representing the Court of Wards and the trustee of the Vizianagaram estate. In Ex. ZZ dated 1st December, 1920, the trustee proposed a method of calculating the net receipts after deducting expenses, and in dealing with the question of proportion of the net income to be fixed as rent, the trustee observed that the total area was about $20\frac{1}{2}$ square miles of which $12\frac{1}{2}$ square miles was at present under the enjoyment of Vizianagaram but to be surrendered to Madgole. On this area therefore a nominal rent was reasonable whereas for the rest of the area, 8 square miles, it is stated that Madgole was entitled to levy "full rent." It was therefore suggested as equitable that for the whole of the area the proportion of the net receipts to be paid as rent should not exceed one half; and the important suggestion is made that the rent for the first decade should be fixed after the forest had been under the management of Vizianagaram for one year, subsequent rent to be revised every ten years. The reason for this suggestion is obviously the difficulty of arriving at a correct figure of net receipts until the whole block had been under a single management for a sufficiently long period. Great emphasis has been laid on behalf of the respondent on this letter, the suggestion being that if the figure of $12\frac{1}{2}$ square miles in the possession of Vizianagaram is excessive, the whole basis upon which the rent was fixed will be destroyed; but as already observed, we are not convinced that there has been any substantial exaggeration of the area actually claimed by Vizianagaram at the time of the dispute.

On the 19th February, 1921, the Collector submitted to the Court of Wards a draft agreement which embodied these suggestions made by the trustee of the Vizianagaram estate and also proposed the acceptance of the trustee's further suggestion that as a preliminary to the lease there should be a survey of the blocks leased out, the cost of the survey to be apportioned between the two estates. This draft is the final draft which is proposed in the plaint to enforce. Besides the provisions originally suggested regarding the admissions and withdrawals to be made by the two estates and the grant of a permanent lease of the Madgole forests and the disputed portion in the Samidha neighbourhood, it was provided that the rent to be paid by the Vizianagaram estate shall be revised periodically once in ten years and in such revisions the annual rent fixed shall be one half of the annual net receipts during the preceding ten years and the manner in which the net receipts should be calculated was specified. As to the first ten years, the only provision was that the rent to be paid shall be fixed in the first instance by the Collector and the trustee; but it is clear from the correspondence that the understanding between the parties was that for the first ten years' period also, the rent should be one half of the net proceeds and should be fixed in the second year on the basis of the first year's receipts. This is shown by the letters, Ex. ZZ dated 1st December, 1920, Ex. AAA dated 26th January, 1921, Ex. NN-1 dated 29th January, 1921 and Ex. OO dated 12th February, 1921. Under this draft agreement therefore the only substantial point still to be settled was the date of the commencement of the lease. At this point, it is clear that the understanding was that no lease should be

given until after the survey had been completed. The question whether there was any understanding regarding the date of the commencement of the lease thereafter is a matter which will be discussed separately.

When this draft agreement arrived in the office of the Court of Wards, it was pointed out that the Court of Wards had ceased to have jurisdiction over the Agency tracts within which the whole of the forest except for the Gudepa area, was situated. This was the result of the constitution of the Agency Division on 6th November, 1920, and the notification making the Agency Commissioner to be the Court of Wards for the estates situated within the Agency Division. The Court of Wards, Madras, therefore, issued proceedings, Ex. YYYYY-14 dated 7th June, 1921, referring to rule 23 of the Agency Rules and holding that it was the Agency Commissioner that should pass orders in the matter. The whole of the file relating to this agreement was therefore transmitted to the Agency Commissioner. On 23rd July, 1921 the Agency Commissioner having received the papers from the Court of Wards, Madras, sent a letter, Ex. CCC to the trustee of the Vizianagaram estate which runs as follows :

"As the disputed plots lie in the agency tracts, the matter under reference has been referred to me for final decision and disposal . . . I am prepared to execute an agreement on the lines of the draft sent with your letter referred to, the details of which are being examined. I agree also to the boundaries of the block to be leased to Vizianagaram being surveyed by the Government Survey party, and to the resulting plans forming part of the agreement and lease. Will you arrange for the survey to be made as soon as possible and let me know the date when it will begin? The Madgole estate will bear half the cost of survey."

The letter referred to by the Agency Commissioner is Ex. OO dated 12th February, 1921, in which the trustee makes his final proposal to the Collector. This letter from the Agency Commissioner, Ex. CCC, is relied on by the appellant as constituting a final acceptance by the Agency Commissioner as Court of Wards for the Madgole estate of the proposal contained in the draft agreement. It is contended for the respondent that the words "the details of which are being examined" imply a reservation and that therefore the acceptance cannot be treated as unconditional. We are unable to accept this contention. It seems to us that the Agency Commissioner gave an unconditional acceptance of the terms set forth in the draft to him. The examination of details by the Agency Commissioner may well denote no more than the consideration of the administrative arrangements necessary to bring the agreement to fruition. It seems to us therefore, that there was in July, 1921, a definite offer and acceptance embodying all the terms necessary to make a concluded bargain, except that the actual sum payable as rent for the first ten years was left to be calculated by the two officers concerned and this provision was accepted on behalf of the Madgole estate by the Agency Commissioner acting as the Court of Wards; that is to say, the Agency Commissioner considered it for the benefit of the Madgole estate that a lease should be given on a rent based on half the net proceeds, that the net proceeds shall be calculated in the way laid down in the schedule to the draft agreement and should be revised each ten years on the basis of the previous ten years' figure and that the Collector and the trustee should in consultation with each other calculate on the agreed basis the sum payable as rent for the first ten years with reference to the first year's receipts.

After this stage was reached, nothing much happened for a considerable period except preparations for survey. It was of course necessary to clear the forest on the boundary line as a preliminary to the demarcation. There was trouble with the local inhabitants and delay in getting this work done. It was however eventually completed and the survey started. Meanwhile in October, 1923, the Agency Division was abolished and the Madgole estate came once more under the supervision of the Court of Wards in Madras. In 1920 a new Collector came into office and took up the question of the fixation of the rent for the first period. He suggested that it was necessary for the Madgole estate to have some sort of check over the accounts of the Vizianagaram estate on the basis of which future rents were to be fixed and he suggested that the rent for the first year should be fixed at a cash figure

of Rs. 1,650 and the revision should be made in the second year. The Collector's letter concludes :

"Please state whether you approve the above conditions and if so the final draft agreement may be sent to me embodying them."

By this time the trust in respect of the Vizianagaram estate had ceased to operate and the Rajah himself replied to the Collector in Ex. WWWW, dated 15th May, 1926, pointing out that it had been agreed in Ex. OO dated 12th February, 1921, that the rent was to be fixed on the basis of the figures of the first year's occupation and that thereafter there should be a decennial revision and he pointed out also that the proposal for a cash rent in the first year and a revision on the basis of the figures in the second year was not in accordance with the terms already decided on. He accepted as reasonable the suggestion that monthly accounts of the forest receipts should be sent to the Madgole Range Officer, but declined to accept the suggestion that this officer should have a right to check the accounts of the Vizianagaram officials. If necessary the District Forest Officer might inspect the permit stations on behalf of the Madgole estate. To this, the Collector replied in Ex. WWWW-1 dated 5th June, 1926, agreeing to the Raja's suggestion that the rent for the first period should be fixed in the second year's occupation and that this figure should be subject to decennial revision. He also agreed to drop the proposal for having the Vizianagaram accounts inspected by the Madgole Range Officer.

Now after this interchange of letters there was no longer anything of substance to be settled regarding the lease. The only point as yet outstanding, viz., the way in which the Vizianagaram accounts were to be checked on behalf of Madgole was settled. They were to be checked only by the transmission of monthly statements to the Madgole office. It has been suggested that this last stage of the agreement cannot bind the Madgole estate because there is no evidence that it received the approval of the Court of Wards. It is however really a matter of detail. The Court of Wards represented by the Agency Commissioner had already approved of the basic proposal regarding the fixation of rent and had already approved of the suggestion that the calculation of rent for the first ten years was to be worked out in agreement by the representatives of the two estates. It does not appear that any further sanction by the Court of Wards was necessary to bind the estate with the agreement taken as a whole.

The survey was not actually completed till the end of 1928. By this time the Court of Wards had ceased to have control of the Madgole estate. The Ranis of Madgole estate having surrendered their interest to the Maharajah of Jeypore, the respondent here, the latter had become the proprietor of the estate. In March 1929, the Dewan of Vizianagaram wrote Ex. XXV to the Dewan of Jeypore reporting the completion of the survey and the receipt of the maps and asking for arrangements to be made for the execution of the agreement and delivery of the forest to the Vizianagaram officials. On this it would appear that the Dewan of Jeypore called for reports from his subordinates, but no action was taken either to complete or to repudiate the agreement in spite of the reminders from the Vizianagaram estate. The plaintiff alleges that the Vizianagaram estate had no definite knowledge before 31st December, 1933, that the defendant had no intention of performing the contract. It would appear that a good deal of the delay in coming to a decision on the part of Jeypore was due to the absence of the late Maharaja from headquarters and his death in 1931, but no definite action was taken on behalf of the Jeypore estate even when a registered notice was sent, Ex. TTTT dated 25th November, 1933, threatening a suit if no final reply was received before 31st December, 1933.

The first question to be decided in this appeal is whether there was a concluded contract. It has been contended by the learned Advocate-General on behalf of the respondent that there was no binding agreement, firstly as to the amount of rent, and secondly as to the date of the commencement of the lease, and that in the absence of certainty on these two points the contract cannot be enforced. The learned Advocate-General has relied upon the undoubted proposition that a mere agreement

to agree cannot constitute a contract. We have, however, indicated our opinion that Ex. CCC dated 23rd July, 1921 constitutes a definite acceptance on behalf of the Court of Wards of all the essential provisions of the agreement, which provisions provided for the definite fixation of the rent on an agreed basis. The ratio of half the net proceeds was undoubtedly accepted for the whole of the term of the lease. The basis on which the rent for the first ten years was to be calculated and also the basis of the decennial revision were covered by the agreement. Though the actual figure of the rent was not yet determined, there was no longer any uncertainty regarding the way in which it should be fixed throughout the lease.

The learned Advocate-General has relied on the decision in *May and Butcher Ltd. v. The King*¹. That was a case in which the parties agreed to the sale of goods at a price to be subsequently fixed between the parties, any dispute to be referred to arbitration. It was held that there was no concluded contract between the parties, for an essential part of the contract was left undetermined and it was pointed out that the arbitration clause had no operation until there was an agreement and there was no agreement until the parties had at some future date fixed the price. It seems to us however that the correspondence of 1926 already referred to must be read as part of the contract between the parties, and that after the letter Ex. WWWW-1 wherein the Collector finally agreed to the method of checking the Vizianagaram accounts there was no longer any uncertainty as to any matter relating to the lease except the actual date on which it should begin.

The learned Advocate-General argues that an agreement to lease which does not fix the date on which the lease is to begin cannot be enforced. This argument is based on the rule in *Marshall v. Berridge*,² where the Court of Appeal held that in order to have a contract which would satisfy the Statute of Frauds it is necessary to find within the four corners of the agreement, the date from which the contemplated lease shall begin and that if the contract is defective in this respect there is no enforceable contract and specific performance cannot be granted. In the case of *Srimati Giribaladasi v. Kali Das Bhanja*³, their Lordships of the Privy Council state :

"It is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run."

and on the peculiar facts of that case whereunder the agreement provided for the execution of a permanent lease "hereafter" their Lordships held, differing from the High Court, that the correspondence between the parties did not indicate an intention that the lease should begin from the date of the agreement as was contended and that therefore the date of the commencement was left uncertain and the lease could not be enforced. In that case, their Lordships were dealing with very special facts and no reference was made to the statutory rule embodied in section 110 of the Transfer of Property Act which lays down that "where no day of commencement is named, the time so limited begins from the making of the lease."

The Privy Council had to deal with another case, *Ikramul Huq v. Wilkie*⁴, where the parties agreed in a series of letters that the lease should be executed shortly of certain properties of which the lessor was to get possession from the tenants and construct a godown for the occupation of the lessee in the course of three or four months. There was some delay in getting possession of the land. When it was obtained the lessee was asked whether he wanted the building constructed according to the original plan or had any alterations to suggest and the lessor said that he was prepared to finish the building within four months. Thereupon the lessee repudiated and justified the repudiation on the ground of the delay on the part of the lessor in not putting himself in a position to complete the transaction. Their Lordships held on the facts of that case that the period within which the building was to be ready was not an essential part of the contract and the contemplation of both parties was that everything should be done without any unreasonable delay. In the

1. (1934) 2 K.B. at 17.

2. 19 Ch. D. 233.

3. (1920) 39 M.L.J. 329 (P.C.).

4. (1907) 17 M.L.J. 454 (P.C.).

circumstances they held that there was a completed contract of which specific performance will be granted. That was clearly a case in which the agreement between the parties did not contain any fixed date for the commencement of the lease. Although their Lordships did not expressly consider the effect of section 110 of the Transfer of Property Act, they do hold that the agreement contemplates the execution of the lease within a reasonable period and by implication it must be inferred that the lease was to run from the date of its execution. The circumstances of that case bear some resemblance to those of the present case. Here too the original agreement contemplates survey operations as a preliminary to the execution of the lease. The precise date on which those survey operations would be concluded was not known. The delay in their completion was not due to the default of either party. It is natural to infer that the parties contemplated the execution of the lease within a reasonable period after the completion of preparatory work. The delay after that date was due partly to the death of the Maharaja of Jeypore and partly to the indecision of his successor; but in the absence of any other date being contemplated, it seems to us reasonable to infer from the circumstances that the parties made their agreement in the light of the statutory provisions of section 110 of the Transfer of Property Act and that it was understood that the lease was to run from the date on which it was executed. A similar view has been taken by the Calcutta High Court in the case of *Kailash Chandra Bhoomik v. Bejoy Kanta Lahiri Chowdhury*¹, where the learned Judges rely upon the decision of the Privy Council just quoted and hold that there was a concluded agreement in the absence of an express stipulation for the date of the commencement of the lease and that it is legitimate to read into the agreement the statutory provisions of section 110 of the Transfer of Property Act. We hold that the agreement in the present case is certain and definite both as to the rent and as to the date from which the lease is to commence and it is not unenforceable for uncertainty in either of these particulars."

The next question is whether the permanent lease contemplated in this agreement was within the power of the Court of Wards. We have already indicated our opinion that the final decision of the parties regarding the manner of the fixation of the net profits for the purpose of calculating the rent for the first ten years must be deemed to have been made with the authority of the Court of Wards, having regard to the approval of the draft agreement by the Agency Commissioner. At the time when the agreement was concluded the Madras Impartible Estates Act had not been extended to the Agency districts. It was however extended by a notification dated 27th November, 1928, and we may take it that the agreement could not now be enforced if it is deemed to offend against the provisions of that Act. Under section 35 of the Court of Wards, Act:

"The Court . . . may give leases . . . of the whole or any part of such property for such terms, as it thinks fit . . . and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for the advantage, of the ward or for the benefit of the property."

The Court of Wards has formally decided that the execution of this agreement is to the advantage of the ward. The Court must however be limited by the restrictions on alienation under the Impartible Estates Act. Section 4 (1) of that Act provides that "the proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt binding on the shares of the other coparceners independently of their consent." It is well established that the managing member of a Hindu joint family can bind the joint family by a compromise made *bona fide* for the benefit of the estate and not for his personal advantage; vide *Mayne's Hindu Law*, 10th edition, page 402.

An attempt has been made to argue that even granting the *bona fide* nature of the settlement accepted by the Court of Wards, it is necessary for the Court to examine critically the details of the bargain between the parties, in order to ascertain whether that bargain was really beneficial to the estate, the suggestion being that if there is reason to think that the Court might have made a better bargain than it did, the compromise will not be binding on the estate. It seems to us that this is not the correct line of approach to a compromise entered into by a manager or representative of a Hindu joint family. No doubt if the bargain is so palpably unfair in its nature as to throw a doubt upon the *bona fides* of the manager, the details of that bargain may assume a very great importance. But where it is clear that there was an actual dispute the settlement of which was in the interests of the estate and that the dispute has been settled by a compromise which appeared to the manager to be a fair arrangement having regard to the contentions of the parties and one which was desirable with a view to prevent future litigation, it is not in our opinion open to the Court to nullify that compromise merely on the ground that one party appears to have driven a better bargain than the other party. The attack on the compromise in the present case rests mainly on assumptions regarding the *bona fides* of the claim by Vizianagaram to have title in an extent of $11\frac{1}{2}$ square miles in the Samidha forests and the suggestion is made that Vizianagaram was giving up practically nothing and was getting a lease of forest admittedly belonging to the Madgole estate for an inadequate rent. We see no reason to think that the claim put forward by Vizianagaram to the disputed area was one which was known to be unsubstantial. Although under this agreement Madgole gave up possession of the disputed area and of a further block admittedly belonging to Madgole, the estate was to get a very substantial rent and to be rid of all trouble and expense in connection with the management of a block of forest admittedly not easy to administer by the Madgole officials. Moreover, the arrangement between the parties was made at a time when each of the estates was under the management of responsible Government officers who had no interest in the matter other than that of an official anxious to administer his charge to the best of his ability. We see no reason to think that this arrangement was unduly favourable to the Vizianagaram estate, nor do we consider that there are any grounds for thinking that the Court of Wards or the Agency Commissioner failed in their duty towards the Madgole estate in accepting the terms agreed upon. We are moreover of opinion that the contract between the parties is within the powers of the proprietor of an impartible estate, having regard to the existence of the dispute and the arrangements made for its settlement.

The question arising out of the non-registration of this agreement need not detain us long. The Registration Act does not apply to the Agency districts. The clause in the agreement relating to the Gudepa forest must be deemed to be one which purports to declare a right, title and interest of the value of more than Rs. 100 in immovable property and by virtue of section 49, the document cannot be used in evidence of the transaction relating to the Gudepa reserve in the absence of registration. This fact, however, has less importance now, seeing that in this Court the appellant has abandoned his claim to enforce against the respondent the surrender of rights in the Gudepa forest contemplated in clause 1 of the draft agreement. There is no legal impediment to the admission in evidence of the unobjectionable portion of the document, part of which has to be excluded for want of registration; and seeing that the appellant is the person who stands to lose by the non-enforcement of the first clause, it is open to him to waive it, vide *Samuier v. Ramasubbier*¹. It seems to us that the clause relating to Gudepa is clearly separable from the rest of the contract and that if the appellant who is the person adversely affected by the non-enforcement of this clause, is prepared to abide by the rest of the contract, the respondent cannot object to the enforcement of the rest of it; vide *Hawksley v. Outram*².

In this view, it is not necessary to go into the question whether the proviso to section 4 of the Registration Act is retrospective.

It has been contended for the respondent that specific performance should be refused by reason of the laches of the appellant and there was also a plea that the enforcement of the contract was barred by limitation. The latter plea is clearly untenable for there was no date fixed in the agreement for its performance from which limitation could run. Nor was there any express refusal to complete the agreement. The suit was brought within three years of the time when as a result of the final notice from the appellant, refusal to complete the agreement might be inferred. It seems to us also that there can be no question of laches in this case. When the statute provides a period of limitation for the bringing of a suit, the remedy of specific performance will not ordinarily be refused on the ground of delay if the suit is within the prescribed period. No doubt cases might arise in which the delay in filing the suit might have led the other side to infer that the plaintiff had waived his rights under the agreement and in such cases the plea of laches might be considered a ground for refusing specific performance. But there is nothing of the kind here. Quite clearly the Vizianagaram estate was throughout insisting on the completion of the agreement. There was no suggestion that the agreement would not be completed so long as the Court of Wards managed the Madgole estate. Even thereafter the Vizianagaram estate was pressing for the completion of the agreement and there was no clear indication of the attitude of the Maharajah of Jeypore in the matter. We are of the opinion that specific performance should not be refused by reason of the delay in filing the suit.

It has been suggested that specific performance should be refused because there was a lack of mutuality in the contract at its inception. We are unable to appreciate this contention. Section 35 of the Court of Wards Act empowers the Court to bind the ward by a contract of this nature and such a contract could have been enforced against the Court of Wards and is therefore enforceable against the present proprietor of Madgole. There is therefore no question of mutuality. It was not suggested that the contract was unenforceable against the Rajah of Vizianagaram.

In the result, therefore, the appeal is allowed and there will be a decree directing the respondent to execute a lease deed in the terms contemplated in the agreement accepted in Ex. CCC dated 23rd July, 1921, and to embody therein the terms regarding the first year's rent accepted in the letter Ex. WWW-1 dated 5th June, 1926, and to attach thereto the plans of the forest block to be leased, prepared at the survey of the boundaries at the instance of both parties. The first clause of the draft agreement relating to the Gudepa reserve will not be enforced. The lease deed will be executed within six months from today, failing which the Court will itself execute the lease. The appellant will be entitled to his costs throughout.

B.V.V.

Appeal allowed

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

Poovachettiar

*Appellant**

v.

Maddan *alias* Kavandappa Goundan and others

Respondents.

Madras Agriculturists' Relief Act (IV of 1938), section 8—Mortgagee purchasing part of hypotheca in pro tanto discharge of the debt—Debt remains same debt and cannot be deemed to be split up and scaled down on that basis.

By the fact of the mortgagee purchasing part of the hypotheca in *pro tanto* discharge of the debt; the debt itself cannot be considered to have been split up so as to be liable to be scaled down on the analogy of cases relating to the splitting up of debts by the debtors executing different documents for portions thereof. There is a mere reduction of the debt by transfer of a portion of the hypotheca to the creditor himself, and, the balance remaining due is the same old debt reduced by a payment. The identity of the debt or its liability to be scaled down as before is not affected.

Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 148 of 1942, preferred against the decree of the Court of the District Munsiff of Tiruppattur in O. S. No. 276 of 1940.

T. L. Venkatarama Aiyar for Appellant.

V. T. Rangaswami Aiyangar and *K. S. Sankararaman* for Respondents.

The Court delivered the following

JUDGMENT.—The only point of law taken is that the plaintiff mortgagee having purchased part of the hypotheca in *pro tanto* discharge of the debt, the debt itself must be considered to have been split up and so is no longer liable to be scaled down on the analogy of cases relating to the splitting up of debts by the debtors executing different documents for portions thereof. It is difficult to see how those decisions are applicable here. What has happened is a reduction of the debt by transfer of a portion of the hypotheca to the creditor himself, and the balance remaining due is the same old debt reduced by a payment. The security may have been split up in the sense that the entire balance may not be recoverable from the properties remaining in the hands of the mortgagors having regard to section 60 of the Transfer of Property Act, but this does not affect the identity of the debt or its liability to be scaled down as before.

The appeal is dismissed with costs of respondents 1, 2, 6 and 7.

(Leave refused).

K.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Rayalla Ramappa

*Appellant**

Criminal Procedure Code (V of 1898), sections 195 (1) (c) and 476—Guardian of minor using false document—Not a party within the meaning of section 195 (1) (c)—Order under section 476 directing complaint to be filed—Propriety—Proper course.

A guardian instituting a suit on behalf of a minor is not a "party" within the meaning of section 195 (1) (c) of the Criminal Procedure Code, against whom a complaint can be directed to issue by an order under section 476 of the Criminal Procedure Code for using a false document in support of the suit claim.

Emperor v. Mallappa Tejappa, A.I.R. 1937 Bom. 14, *Rupchand v. Dashoda*, (1907) I.L.R. 30 All. 55 and *Satyanarayana v. Anjareddi*, I.L.R. (1941) Mad. 985 : (1941) 1 M.L.J. 765, relied on.

Although such a guardian is not a party within the meaning of that section, it will be open to the Court to proceed against him in respect of an offence punishable under section 193 of the Indian Penal Code which in the circumstances of the case, he would appear to have committed.

Appeal against the order of the District Court of Bellary, dated 18th September, 1942 in A. S. No. 116 of 1940 (O. S. No. 101 of 1938, District Munsiff's Court, Bellary).

T. S. Swaminatha Aiyar for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The main point taken in this appeal against an order under section 476 of the Criminal Procedure Code is that the appellant against whom a complaint has been directed to issue for offences he is alleged to have committed under sections 465, 467 and 471 of the Indian Penal Code was not a party to the proceeding within the meaning of section 195 (1) (c) of the Code. The appellant's learned advocate relies on the decision in *Emperor v. Mallappa Tejappa*¹, in which it was held that the guardian or next friend of a minor plaintiff in a suit was not a party to the proceeding within the meaning of section 195 (1) (c) of the Code. In the course of the judgment reference was made to *Rupchand v. Dasodha*², a case in which the question of limitation was involved; the plaintiff had appealed but failed to implead the guardian *ad litem* of the minor respondent, and by the time

* A. A. O. No. 501 of 1942.

1. A.I.R. 1937 Bom. 14.

24th July, 1944.
2. (1907) I.L.R. 30 All. 55.

an attempt was made to remedy the defect the period of limitation had run out; objection was taken but it was held that there was no substance in it because the guardian *ad litem* was not a party to the suit or to the appeal. In *Satyanarayana v. Anjareddi*¹, the learned Chief Justice and Somayya, J., held that the word "plaintiff" in section 95 of the Civil Procedure Code must be confined to the plaintiff and it does not include the next friend of a minor plaintiff, and consequently no order could be made under that section against the next friend of a minor plaintiff by way of compensation. The learned Public Prosecutor contends that a guardian instituting a suit on behalf of a minor is as much a plaintiff as a party who is litigating in his own name; but in view of these authorities, and there is no decision cited to the contrary, I must hold that a guardian is not a party within the meaning of section 195 (1) (c) of the Criminal Procedure Code. In view of this, it becomes unnecessary to consider the other objections which have been taken to the order and it is accordingly set aside.

There are, however, circumstances in this case which render it necessary that action should be taken against the appellant who has since 1928 been mainly instrumental in agitating the claims of his son to have been adopted by one Lakshmappa in that year. The falsity of the claim and the document on which reliance was placed has been found by more than one learned District Judge; and although the appellant may not be a party within the meaning of section 195 (1) (c) of the Code, it will be open to the learned District Judge to proceed against him in respect of an offence punishable under section 193 of the Indian Penal Code which he would appear to have committed. In the course of his evidence he stated that he was present when the adoption took place, that the adoption deed was drawn up and executed in his presence, and that he attested it. Whether or not the delay which has elapsed between 1928 and the present proceedings is material will no doubt be decided by the learned District Judge if he initiates further proceedings. No order as to costs.

K.S.

Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Vushthepalle Swami Setti

Appellant*

v.

Dandu Lakshmireddi and another

Respondents.

Madras Agriculturists' Relief Act (IV of 1938), section 8, explanation—Debt under promissory note in favour of two partners—Dissolution of partnership—Debt taken over by one—Mortgage for promissory note amounts and two other sums in favour of the latter—Application to scale down—Creditor whether same—Section 8 cannot be brought into force.

The respondents had in 1927 executed a promissory note in favour of the appellant and another—they being members of an unregistered partnership—for a certain amount. Later on the appellant and his partner became divided and this debt fell to the share of the appellant. In consequence of this arrangement a mortgage deed was executed in April, 1934, in favour of the appellant which comprised the amount still due under the note together with two other sums. On the question whether the creditor under the mortgage is the same person as the creditors under the promissory note so as to bring into force the explanation to section 8 of the Madras Act IV of 1938,

Held, that in deciding the question who is the creditor under a promissory note regard must be had not only to the power to grant a valid discharge but also to the power to enforce performance of the contract; that the previous promissory note which could be enforced only by the two promisees jointly was a debt, the creditor of which was two persons and not one; and that the later mortgage in favour of one alone of the two partners could not be said to be in favour of the same creditor as under the promissory note. In that view the explanation to section 8 of the Act could not be brought into force.

Appeal against the order of the Court of the Subordinate Judge of Kurnool dated 3rd February, 1943 and made in O. P. No. 5 of 1942.

P. C. Parthasarathy Aiyangar for Appellant.

Kasturi Seshagiri Rao for Respondents.

The Judgment of the Court was delivered by

¹. (1941) 1 M.L.J. 765 : I.L.R. (1941) Mad. 985.
* A. A. O. No. 346 of 1943.

Wadsworth, J.—This appeal arises out of an application by the appellant, a mortgagee, praying the Court to scale down the debt due to the appellant by the respondents under a mortgage deed, Ex. P-1. The application is filed under the rules framed under Madras Act IV of 1938. The history of the transaction may be briefly summarised. In 1927, the respondents executed a promissory note for Rs. 5,000 in favour of the appellant and one Ranga Reddy. It appears that the appellant and Ranga Reddy were at that time members of an unregistered partnership. In 1932, after payments had been made towards this promissory note, there was a renewal in favour of the same parties for a sum of Rs. 4,385. Apparently there was a dissolution of partnership or an agreement to divide the joint assets between the appellant and Ranga Reddy, as a result of which this debt fell to the share of the appellant. As a consequence of this arrangement, the respondents on 12th April, 1934, executed a mortgage in favour of the appellant for Rs. 6,000 which comprised Rs. 5,099-12-0 due under the promissory note of 1932 in favour of the appellant and Ranga Reddy, together with two other sums with which we are not immediately concerned.

The lower Court has taken the view that the mortgage must be treated as a renewal of the antecedent indebtedness under the promissory notes and has inferred that there was an assignment by reason of the dissolution of the unregistered partnership between the appellant and Ranga Reddy. It seems to us quite clear that there was no legal assignment so far as the evidence before us goes. There was no endorsement on the note and no document assigning the note to the appellant has been put into evidence or is alleged to exist. It has, however, been argued that because the appellant was a creditor under the antecedent promissory notes and because he is the creditor under the mortgage, the creditor under the mortgage is the same creditor as the creditors under the promissory notes, so as to bring into force the explanation to section 8 of the Act. This argument has been reinforced by pointing out that one of the two joint promisees under the antecedent promissory note could have given a valid discharge, having regard to the decision of the Full Bench in *Annapurnamma v. Akkayya*¹. There is no doubt that we have repelled the contention that where a debt is in the name of a benamidar the real owner can be deemed to be the creditor, by applying the criterion whether the real owner could give a valid discharge. This does not, however, mean that the power to give a discharge is the sole criterion to be applied in order to find out who is the creditor under a promissory note in the name of two persons. It has been pointed out that the power of one of two joint promisees to give a discharge, recognised by the Full Bench with reference to the provisions of section 38 of the Indian Contract Act, is a very limited power extending only to the acceptance of an offer of full payment of the debt. It was held in *Ramaswami v. Kotayya*², that one of two joint promisees could not give a discharge by taking a fresh document in his own name. It is moreover clear having regard to the provisions of section 45 of the Contract Act that one of two joint promisees has not the power to claim performance of the contract without impleading his co-promisee, and it seems to us that in deciding the question who is the creditor under a promissory note we must have regard not only to the power to grant a valid discharge but also to the power to enforce performance of the contract. It follows from this reasoning that the antecedent promissory note which could be enforced only by the two promisees jointly was a debt, the creditor of which was two persons and not one. It follows that the mortgage in favour of one alone of two persons is not to the same creditor as the creditor under the antecedent promissory note.

In this view, we allow the appeal with costs in both Courts and give a declaration that the amount due under the suit mortgage will be as claimed by the petitioner, namely, the principal amount of the mortgage with interest at 5 per cent. upto 22nd March, 1938, and thereafter at 6½ per cent.

K.C.

Appeal allowed.

1. (1913) 24 M.L.J. 333 : I.L.R. 36 Mad. 544 (F.B.).

2. (1924) 47 M.L.J. 840 : I.L.R. 48 Mad. 693.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

Akella Jagannadham, Son of Venkanna and others

.. Appellants*

Venuthurupalli Narasimham and others

.. Respondents.

Madras Agriculturists' Relief Act (IV of 1938), section 8 (2)—Usufructuary mortgage for 60 years—Annual rent fixed on basis of agreed rate of interest—Absence of provision as to any deficiency or excess in yield—Receipt of profits cannot be regarded as payments by debtor for purposes of section 8 (2) of Act (IV of 1938)—Stipulation that mortgagee was to be in possession for a specified period—No clog on equity of redemption—Mortgagor barred from redeeming before the expiry of the term fixed.

A usufructuary mortgage executed on 11th November, 1893, for Rs. 625 provided that the sum should carry interest at the rate of Rs. 0-10-8 per cent. per month which would amount to Rs. 50 per annum. The document recited that a fixed rent of Rs. 50 per year was settled in respect of the lands and proceeded: "towards the interest due on the aforesaid principal you shall enjoy the said lands for a period of 60 years . . . After the expiry of the period on our paying the principal amount you shall immediately deliver possession of the lands and documents to us . . ."

In a suit filed in 1939 for redemption claiming that the debt must be deemed to have been fully discharged by the operation of Madras Act IV of 1938,

Held, that though interest at a particular rate was mentioned, there being no provision in the bond that if the yield of the property was less than the estimated rent of Rs. 50 the mortgagor was liable to make good the deficiency or if the yield was more the mortgagees were accountable to the mortgagor for the excess over such rent, the receipt of the profits by the mortgagees could not be regarded as payments by the debtor for the purpose of section 8 (2) of Madras Act IV of 1938. Accordingly the mortgage debt cannot be deemed to have been discharged under the Act.

The stipulation that the mortgagees should continue in possession for a specified period cannot be regarded as a clog on the equity of redemption. The right to redeem will arise, in the present case only on the expiry of the 60 years.

Appeal against the order of the Court of the Subordinate Judge of Vizagapatam, dated 8th September, 1942, and made in A. S. No. 20 of 1942, preferred against the decree of the Court of the District Munsiff of Vizagapatam in O. S. No. 291 of 1939.

Y. Suryanarayana for Appellants.

B. V. Ramanarasu and P. R. Ramachandra Rao for Respondents.

The Court delivered the following

JUDGMENT.—This appeal has been preferred by defendants 1 to 13 who represent the mortgagees under a usufructuary mortgage executed on 11th November, 1893. The mortgagors now represented by respondents 1 to 3 brought the suit for redemption of the mortgage. The mortgage was for a sum of Rs. 625 and the document provided that the sum should carry interest at the rate of Rs. 0-10-8 per cent. per month. At this rate which is equivalent to eight per cent. per annum the annual interest on the mortgage money amounted to Rs. 50. The document recites that a fixed rent of Rs. 50 per year was settled in respect of the lands some of which had been cultivated and were in the occupation of tenants, the others being waste lands and then proceeds as follows:

"Therefore, towards the interest due on the aforesaid sum principal you shall enjoy the said lands for a period of 60 years, that is, from the current year Vijaya (1893) to the end of the recurring Vijaya year, viz., 1953 by way of leasing out the said lands, etc., and enjoying as you like the usufruct therein. After the expiry of the stipulated period, that is, after the end of 60 years, on our paying to you at the commencement of Mesham of any year, the principal amount, you shall immediately deliver possession of the lands and the document to us. As the profit or loss in respect of the lease, etc., relating to the lands is only yours, you shall raise extensive cultivation in the said lands and enjoy the same. You shall not be entitled to claim (any amount) towards the repairs executed by you in respect of the said lands after the expiry of the stipulated period. Even if we should offer to pay to you the principal amount within the stipulated period you are not bound to receive the same but shall enjoy the said lands as you like."

The other provisions of the deed are not material for the purpose of this appeal. Notwithstanding that the period stipulated in the deed has not yet expired, the respondents 1 to 3 claim to redeem the properties on the ground that under the Madras Agriculturists' Relief Act, the whole debt must be deemed to have been

discharged by the mortgagee, receiving the profits from the land at the rate of Rs. 50 per year and that therefore the mortgagee was bound to deliver back possession of the lands.

The suit was resisted mainly on three grounds : first, that the Act was not applicable to the debt in question as the mortgage debt had been assigned to defendants 12 and 13 who were widows of the mortgagee's family entitled to maintenance as against the members of the family and that therefore the debt was exempted under section 4 (h) of the Act ; secondly, that even if the Act was applicable, the debt was not liable to be scaled down under the provisions thereof as the receipt of the profits by the mortgagee under the terms of the deed could not be regarded as payments by the mortgagors within the meaning of section 8 (2) of the Act ; and thirdly, that even if such receipts could be regarded as payments and the debt must be deemed to have been discharged, the provision that the mortgagee should continue in possession of the properties for a fixed period of sixty years would disentitle the mortgagors to claim possession of the properties before the expiry of that period, and that the suit was accordingly premature.

The trial Court dismissed the suit upholding the second of these contentions, namely, that there were no payments within the meaning of section 8 (2) of the Act. It also accepted another contention raised by the defendants, namely, that the debt was not payable at the commencement of the Act, because the time for payment had not yet arrived under the terms of the bond. As this Court has held that the word "payable" in section 7 means only "recoverable" and that it would be sufficient for the purposes of the Act if the liability had been incurred at the commencement thereof, this contention was not pressed in this Court. The trial Court negatived the contention regarding the assignment of the debt to defendants 12 and 13, holding that the assignment was not valid because the mortgagors were not consenting parties to it. In the result, it dismissed the suit. On appeal by the respondents 1 to 3 herein the learned Subordinate Judge, while agreeing with the trial Court as regards the alleged assignment of the debt to defendants 12 and 13, differed on the question of the liability of the debt to be scaled down under the provisions of the Act. He held that the bond having provided for a rate of interest, the exemption under section 10 (2) (i) of the Act did not apply and that the receipt by the mortgagees of the rents and profits of the property were payments by the debtors within the meaning of section 8 (2) of the Act. On that footing as admittedly more than Rs. 2,000 had been received by the mortgagee's family, he held that the debt must be deemed to have been discharged and that therefore the respondents 1 to 3 herein were entitled to redeem. He accordingly remanded the suit to the trial Court for disposal after determining sundry other issues raised in the case which were left undetermined by that Court.

This Court had occasion to consider at some length in *Manavala v. Mohamed-Tooosuf*¹, the question whether the receipt of the profits by a mortgagee holding possession under a usufructuary mortgage which imposed no obligation on him to account for the profits of the property and provided for redemption on payment merely of the principal sum secured could be regarded as payments by the debtor within the meaning of section 8 (2) of the Act, and it was pointed out that unless there was something in the nature of a settlement or adjustment between the debtor and the creditor whereby the rents received were adjusted towards the interest made payable under the bond there would be no constructive payment in such cases. If the bond, for instance, had provided for interest to be paid to the mortgagee at a particular rate irrespective of the yield which the mortgagee might derive from the property, and the mortgagee on his part had undertaken to adjust the rents received towards the interest thus made payable to him and to account for the balance if any there would be a case for holding that there was a constructive payment when the rents were so adjusted towards interest. But that is not the position under the terms of this bond. Though interest at a particular rate was mentioned, there is

no provision in the bond that if the yield of the property was less than the estimated rent of Rs. 50 the mortgagor was liable to make good the deficiency. Nor on the other hand was it stipulated that if during any year the mortgagee received more than the estimated rent from the land he was to be accountable to the mortgagor for the excess over such rent. The deed expressly provides that the mortgagor should be entitled to redeem the property on payment of the principal sum alone. Under these circumstances, as pointed in *Vasudevan Nambudiri v. Valia Thirumalpad*¹, the mention of interest by the parties could only be regarded as made for the purpose of assessing the return to the mortgagee on the amount invested by him on the basis of the estimated yield. The position here is very similar, and it follows therefore that the receipt of the profits by the mortgagees could not be regarded as payments by the debtor for the purpose of section 8 (2) of the Act. In this view, the mortgage debt cannot be deemed to have been discharged under the Act.

Mr. Ramanarasu for the respondents submitted that in view of the long period during which the mortgagee's family has been in possession he should be allowed to redeem the property on payment of the debt; but it is difficult to see how the mortgagors can be allowed this right before the expiry of the period stipulated in the mortgage. It has been held in several cases that a stipulation that the mortgagee should continue in possession for a specified period cannot be regarded as a clog on the mortgagor's equity of redemption; in fact, the mortgagor's right to redeem arises only on the expiry of the period in such cases, and there can be no question of any clog on such right.

As there will be no scaling down under the Act, it is unnecessary to consider the exemption claimed by the defendants 12 and 13 on the footing of their ownership of the debt.

In the result, the appeal is allowed, the order of remand made by the lower appellate Court is set aside and the decree of the trial Court dated the 23rd December, 1940, is restored. The appellant will have his costs in this and in the lower appellate Court. Leave to appeal is refused.

K.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Minor Athilinga Goundar by guardian Thirumal Ammal .. *Appellant**

v.

Minor Ramaswami Goundar and others

.. *Respondents.*

Hindu Law—Partition—After-born son—Right to re-open—Retention by father of a few items for his maintenance for life with provision for their division after his death by his sons equally—Not a retention of a "share" to which after-born son's claim will be limited—Provision in partition for male children who might thereafter be born—Cannot affect or qualify after-born son's right to re-open partition.

A Hindu with two wives had one son by his senior wife and two sons by his junior wife when he effected a partition of the family properties. The sons were all minors at the time. By the partition one share was allotted to the senior wife and her son and two shares were allotted to the junior wife and her sons. The father retained for himself a few items of properties for his own maintenance, but without power of alienation. After his lifetime those properties were to be taken by the three sons in equal shares. Male children who might thereafter be born to either of the wives were to be provided out of the share allotted to their own mother and uterine brother or brothers under the partition deed. A son who was born to the senior wife nearly a year after the partition claimed a reopening of the partition. The claim was resisted by the sons of the junior wife by saying that a share had really been allotted to the father and the after-born son was entitled to that share only; that even assuming that the father had not retained a share, the right to re-open the partition was not available inasmuch as provision had been made in the partition itself for a share being given to the after-born son in a particular way.

Held: Taking the partition deed as a whole it cannot be said that what was retained by the father was anything but a provision for his maintenance. It was not a share in

the property as the provision was not only limited to the duration of his life but on his death the sons were to divide the properties equally among themselves.

The provision for giving a share to the after-born son by his uterine brother out of the property allotted to him cannot qualify the right of the after-born son to re-open the partition and claim a share in the entire property.

Ganpat v. Gopalrao, (1899) I.L.R. 23 Bom. 636, distinguished; and *Chengama Nayudu v. Munisami Nayudu*, (1896) I.L.R. 20 Mad. 75, 77, followed.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin in A.S. No. 46/41 preferred against the decree of the Court of the District Munsif of Tuticorin in O.S. No. 31/40.

A. Swaminatha Aiyar for Appellant.

R. Ramamurthi Aiyar for Respondents.

The Court delivered the following

JUDGMENTS: *Krishnaswami Ayyangar, J.*—This second appeal arises out of a suit instituted by the two sons of one Alagu Goundar by his second wife against his two sons by his first wife. Alagu Goundar had married two wives, Kasi Ammal and Onnammal. On the 28th November, 1934, he effected a partition of the family properties but reserved no share for himself. At this date he had one son, Alagu Goundar, by his senior wife, Kasi Ammal, and two sons Perumal and Ramaswami by his junior wife, Onnammal. They were all minors. The scheme of the partition was to allot one share to Kasi Ammal and her son the first defendant and two shares to Onnammal and her two sons, the plaintiffs in the present suit. He retained for himself a few items of properties for his own maintenance but without power of alienation. After his lifetime those properties were to be taken by his three sons in equal shares. The possibility of male children being subsequently born was contemplated and to meet that contingency the following provision was inserted in the deed: "male children who might hereafter be born out of your (the two wives Kasi Ammal and Onnammal) loins should be provided for out of the shares allotted to the respective families". The word "families" occurring here has reference to the two branches represented by the two wives of Alagu Goundar. The meaning of the clause is that if a son should be born in future to either of his wives that son should get his share out of the properties allotted to his own mother and uterine brother or brothers under the partition deed and not from out of the properties allotted to the other branch.

Alagu Goundar died in 1939. The plaintiffs who are the two sons by his junior wife instituted the suit for the recovery of two-thirds share in those properties which had been reserved for the maintenance of the father, under the partition deed. The defendants were (1) Alagu Goundar, the first son by the senior wife Kasi Ammal, who had been born before the date of the partition, and (2) another son, by the same Kasi Ammal born on the 18th November, 1935, nearly a year after the partition. The contention of the subsequently born son who is the appellant in the second appeal is that he is entitled to have the partition re-opened as no share had been set apart for the father at the partition. He relies upon the principle of Hindu law stated at page 381 of Mullah's Hindu Law to the following effect,

"Where the father has not reserved a share for himself at a partition with his sons, a son who is born as well as begotten after the partition is entitled to have the partition re-opened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property."

This statement of the law is practically the same as that laid down in *Chengama v. Muniswami*¹. The correctness of this proposition so far as it goes has not been challenged before us and indeed, it appears to be amply supported by autho-

city. One of the contentions advanced in the Courts below was that on a true construction of the deed it must be held that a share had really been allotted to the father and that the rule of law relied on cannot therefore be invoked. The lower appellate Court has not accepted this contention and I am of opinion that taking the document as a whole it cannot be said that what was retained by the father was anything but a provision for his maintenance. It was certainly not a share in the property because this provision is not only limited to the duration of his life but is immediately followed by the express statement that on his death his sons should divide the properties equally among themselves.

Here then we have a case where a partition was made by the father by dividing the family property amongst his sons, but reserving no share for himself. The appellant who was begotten and born after the partition is obviously within the rule stated above, and is *prima facie* entitled to have the partition re-opened and obtain for himself a share equal to that of his brothers. Mr. Ramamurthi, on behalf of the respondents contends however that the rule has been too broadly enunciated and according to him, it requires to be qualified. It is said that the after-born son cannot re-open the partition even when the father had reserved no share for himself, if the father had made some other provision for some share being given to him and that provision is not unfair. It is argued that in the present case the direction that the future born son should get his share out of the share allotted to his uterine brother or brothers is such a provision and that it takes away his right to have the partition re-opened. No authority has been cited in support of the qualification contended for by the respondent's counsel. Reference was made to the decision of Ranade, J., in *Ganpat v. Gopalrao*¹, where the facts were as follows. In 1875 one Venkatrav, who had at the time three sons effected a division of the family properties by allotting an one third share to his eldest son and keeping the remaining two-thirds in his own possession for the benefit of his two other minor sons. In 1880 Venkatrav had another son born to him and that son instituted a suit in 1895 for a fresh partition of the whole of Venkatrav's properties ignoring the partition of 1875. The learned Judge held that the plaintiff was not entitled to have a fresh partition though the eldest son of Venkatrav had received an one-third instead of an one-fourth share to which alone he was entitled. The suit was instituted after the death of Venkatrav. After stating that the general rule of Hindu law as expounded by the Mitakshara, Mayukha and the Smritichandrika, is that a son born after partition has no claim on the wealth of his separated brother and that he has a preferential claim on the wealth of his parents only, the learned Judge observed as follows:

"The somewhat vague texts of Visnu and Yajnavalkya, which direct separated brothers to give a share to an after-born son, apply to sons who have no provision made for them, and have further been explained by the commentators as applicable only to the case of posthumous sons. In the present case, there has been no partition between the brothers. The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for over twelve years, and it cannot now be disturbed at appellant's instance. His claim can only be made against respondents Nos. 2 and 3, who lived with their father in union, and with whom he himself has been all along living as a member of a joint family." (The italics are mine.)

It is quite clear that the facts of this case are totally different from those of the present, because the effect of the partition was to separate the eldest son from the family, the other members, namely, the father and his two other sons living and continuing to live in union. It is not a case where the father had not reserved a share for himself at the partition. Indeed, the contrary is implied from the fact that the family properties other than that allotted to the eldest son

were retained in the hands of the father who with his two other sons still constituted a joint family. It may be that he intended that the two-thirds in his hands should be taken by his two sons who remained with him. But if the question of their rights *inter se* were raised, the only answer would be that the father and his two sons should share the properties retained in his hands. It is abundantly clear from the context that the learned Judge in using the words in italics was only paraphrasing the rule of law laid down in *Chengama v. Muniswami*¹, and accepted as correct in all the later cases and the text books. I am unable to agree that these words lend support to the qualification for which Mr. Ramamurthi has contended.

The result is that the rule of law as stated in Mulla's Hindu Law applies to the facts of the present case. The appellant is an after-born son and his father Alagu Goundar had not reserved a share for himself. The consequence is that the appellant is entitled to have the partition re-opened. In this view the decision of the Subordinate Judge cannot stand. The appeal is accordingly allowed and the decree of the District Munsif restored with costs here and in the lower appellate Court payable by respondents 1 and 2.

Mockett, J.—I agree. I am adding a few words because I should like to make it clear that we are being invited to engraft a new rule of Hindu law on to the principles relating to sons born after partition. The position with regard to sons born after partition is well established to-day. It is stated in Mayne's Hindu Law, paragraph 420,

"If the father had divided the whole property among his sons, retaining no share for himself, then the sons, with whom partition was made, must allot from their shares a portion equal to their own to an after-born son."

In this case I agree that there was no allotment of shares to the father because all that was arranged was that there should be provision for his maintenance during his lifetime. But it is argued by the learned counsel for the respondents that inasmuch as the partition deed did make provision in anticipation for a son born after partition, that arrangement should stand provided it was a fair arrangement. That may be a sound rule of commonsense, but there is no authority for it and none has been cited before us. The decision in *Ganpat v. Gopalrao*², to which my learned brother has referred is on totally different facts and it is interesting to note that the learned Judge when giving judgment expressly (at page 641) mentions that the feature of the case before him was that there was no partition between the three sons of Venkatrav (the father) in which Venkatrav left no share for himself. I should be very reluctant except when constrained by clear authority to hold that there was any rule of Hindu law relating to this matter which involved a consideration of what was and was not a proper provision to be made for a potential post-partition son or sons. I prefer the rule as it stands and I agree with my learned brother that that rule to-day is clear. The learned Judge has decided this case on the basis that the provision which had been made for the post partition son was fair. In my opinion he erred. It may be pointed out that under the arrangement in the partition the appellant would have got one-sixth only whereas under the law as I understand it he gets one-fourth. In so deciding the learned Judge has done the very thing to which I have referred, namely, he has brought into existence a new rule of Hindu law. I accordingly agree that this appeal should be allowed and with the order proposed as to costs.

K.S.

• Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Draksha Chinna Gurumurthi

.. Petitioner.*

Defence of India Rules (1939), rule 39 (2)—Occupation—Meaning—Prejudicial literature found in room shared by accused and his undivided elder brother—Prosecution for unlawful possession of such literature—Burden of proving innocence is on the accused though he was not in sole "occupation" of the premises.

The use of the word "occupation" in rule 39 (2) of the Defence of India Rules contemplates physical occupation rather than occupation in the sense of being the legal tenant or other person who may be looked to for the payment of taxes, etc.

Where on a search by the police in a room shared by the accused and his undivided elder brother (the manager of the joint Hindu family) a large quantity of highly prejudicial literature was found in an unlocked metal box, in a prosecution for unlawful possession of such literature,

Held, that the burden lay on the accused of proving his innocence and that it is not necessary for the prosecution to prove that the accused was in sole occupation of the premises where the prejudicial literature was found, as a joint occupation with another person is sufficient "occupation" for the purposes of rule 39 (2) of the Defence of India Rules in order to cast the burden of proving his innocence on the accused.

Ananthanath Chatterji v. King-Emperor, (1943) I.L.R. 22 Pat. 549 and *Sumati Bai v. Emperor*, A.I.R. 1944 Bom. 125, distinguished.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Cuddapah in C.A. No. 9 of 1944, preferred against the judgment of the Court of the Additional First Class Magistrate, Cuddapah, in C.C. No. 253 of 1943.

K. Krishnaswami Ayyangar and N. C. Raghavachari for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was convicted of the unlawful possession of prejudicial literature under rule 39 of the Defence of India Rules and sentenced to rigorous imprisonment for two years, his conviction and sentence being upheld on appeal.

The facts of the case in so far as they are necessary at this stage are that the petitioner was living in a house with his mother and his undivided elder brother, the latter having been found to be the manager of the family. In the room shared by the petitioner and his brother a large quantity of highly prejudicial matter was found by the police in an unlocked metal box when they searched the premises. Some attempt was made in the evidence to show that there was other material in this box which would identify it as the property of the petitioner, but this evidence was not accepted. However, the convicting Magistrate relied upon rule 39 (2) of the rules and as the petitioner was in occupation of the premises, the burden lay upon him of proving his innocence. The witnesses examined for the defence were disbelieved, and the petitioner was convicted and sentenced as already stated.

The only question which arises in revision is whether the joint occupation of the room by the accused and his undivided brother is sufficient occupation within the meaning of rule 39 (2) of the Defence of India Rules so as to cast upon him the burden of proof. In support of his argument that it does not his learned advocate relied on two decisions. The first is *Ananthanath Chatterji v. King-Emperor*¹. That was a case in which the alleged prejudicial literature was found in a room in the occupation of an accused and his elder brother, the

*Crl.R.C. No. 291 of 1944
(Crl.R.P. No. 277 of 1944).

1st August, 1944.

1. (1943) I.L.R. 22 Pat. 549.

latter being a person who was detained under the Defence of India Rules and the former only a young boy who pleaded that he had no knowledge of the books or of their origin. It was held that he was not in occupation of the premises within the meaning of the rule, but from the judgment it does not appear that the question of how far the joint occupation of premises by undivided members of the same Hindu family is effective occupation was examined. Brough, J., appears to have reached his conclusion more upon a consideration of the effect of shifting the burden of proof, and there was also the circumstance that the accused was only a boy. Manohar Lall, J., held that the publications found in the room were not prejudicial documents within the meaning of the rule, and so he did not find it necessary to express an opinion on the question arising under rule 39 (2).

The other case relied on is *Sumatibai v. Emperor*¹, a case in which a husband and his wife had been convicted for the possession of prejudicial literature found in the premises occupied by them both. It was held in that case that his wife should not be held to be the occupier of the house unless it could be shown that she was in fact the occupier and that her husband was a mere appendix to her.

Neither of these cases deals with the occupation of premises by undivided members of a Hindu joint family, each of whom owns an undivided share in every portion of the property and each of whom is competent to exercise his rights of ownership in the property. I consider that the use of the word 'occupation' in rule 39 (2) of the Defence of India Rules contemplates physical occupation rather than occupation in the sense of being the legal tenant or other person who may be looked to for the payment of taxes, etc. If the Legislature had intended that the occupation contemplated by sub-clause (2) of the rule was to be sole or effective occupation, the necessary words would doubtless have been inserted. The petitioner's learned advocate has strenuously argued that the mere presence of prejudicial literature in a room where the accused lives is not sufficient proof of possession by him. But if possession can be proved, then there is no necessity to have recourse to clause (2) of the rule; because if actual possession is established then the case comes under clause (1). My view is that it is not necessary for the prosecution to prove that the accused is in sole occupation of premises where prejudicial literature has been found, and that joint occupation with another person is sufficient occupation for the purposes of the rule in order to cast the burden of proof upon him. In the earlier of the two cases cited, Brough, J., has commented upon the difficulties of proof in such a case where one of several persons is prosecuted for the possession of prejudicial literature found on premises in the possession of them all; but with all due respect to the learned Judge, I cannot agree that the physical occupation of premises by several members of a family should not be accepted as occupation by any one of them merely because the operation of the rule may result in difficulties in discharging the burden which the rule imposes. It was doubtless with a view to meeting cases of this kind, where prejudicial literature is found on premises in the joint occupation of more than one person, that the rule was framed so as to throw upon those persons the burden of disproving their guilt, in the same way that section 65 of the City Police Act and section 64 of the Madras Abkari Act throw upon an accused person the burden of proving his innocence.

There is no necessity for any interference in revision and the petition is dismissed.

K.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

K. V. Subramanja Ayyar

.. Petitioner.*

Motor Vehicles Act (IV of 1938)—Offences under sections 78, 86 and 116—Sentence of fines amounting in all to Rs. 45 and disqualification for three months for holding driving license under section 17 (1) of the Act—No appeal lies—Criminal Procedure Code (V of 1898), sections 367 (2), 408 and 413.

Where in respect of offences punishable under sections 78, 86 and 116 of the Motor Vehicles Act, the accused was convicted and sentenced to pay fines amounting in all to Rs. 45 and was also disqualified for three months for holding a driving license,

Held, that no appeal lay against the convictions. The punishment which has to be specified under section 367 (2) of the Criminal Procedure Code cannot include an order of disqualification for holding a license.

Petitions under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Session of the Coimbatore division in C. A. No. 122 of 1943, preferred against the judgment of the Court of the Joint First Class Magistrate of Coonoor in S. C. No. 47 of 1943, and the judgment of the said Court of the Joint First Class Magistrate of Coonoor in the said S. C. No. 47 of 1943, respectively.

A. C. Muthanna for N. Ramanatha Aiyar and P. S. Kailasam for Petitioner. The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was convicted by the learned Joint First Class Magistrate, Coonoor, of offences punishable under sections 78, 86 and 116 of the Motor Vehicles Act and sentenced to pay fines amounting in all to Rs. 45. He was also disqualified for three months for holding a driving license under section 17 (1) of the Act; but when an appeal was taken to the Sessions Court of Coimbatore under section 17 (7) of the Act, the learned Judge set aside the order of disqualification although he held that no appeal lay against the convictions. Against that order Criminal Revision Case No. 84 of 1944 has been brought, and Criminal Revision Case No. 85 of 1944 is against the convictions by the learned Joint Magistrate.

Regarding the right of appeal it is contended that it is taken away by section 413 of the Criminal Procedure Code only when there is a sentence of fine not exceeding Rs. 50, and that as there is in addition to the fines the order of disqualification an appeal will lie under section 408 of the Code. This argument assumes that an order of disqualification for holding a driving license is a punishment, but it is clear from section 4 of the Criminal Procedure Code, read with section 53 of the Indian Penal Code that the punishment which has to be specified under section 367 (2) of the Criminal Procedure Code cannot include an order of disqualification for holding a license. This also appears from section 17 (1) of the Motor Vehicles Act, which provides for the imposition of an order of disqualification in addition to any other punishment authorised by law; and clause (7) of the same section confers upon the appellate Court the power to revise an order of disqualification although no appeal lies from the conviction. The order of the learned Sessions Judge dismissing the appeal as not competent is clearly correct and the revision petition in respect of it has to be dismissed.

Regarding Criminal Revision Case No. 85 of 1944, the convictions for disobeying a traffic signal, failing to produce the driving license, and driving recklessly or dangerously depend upon findings of fact which cannot be challenged in revision and this petition also has to be dismissed.

K.S.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VERE MOCKETT, OFFICIATING CHIEF JUSTICE, AND MR. JUSTICE KUPPUSWAMI AYYAR.

Harjivandas C. Parikh and another

.. Appellants*

v.

Triveni Bai *alias* Radha Bai

.. Respondent.

Practice—Report of Official Referee on taking accounts—Findings when liable to attack.

A finding of the Official Referee can be attacked just as any other finding can be attacked and there is no warrant for the view that findings of fact of the Official Referee can be attacked only when they are based on no evidence.

• Judgment in O.S. Appeal No. 61 of 1934, unreported followed.

On appeal from the judgment, dated 25—1—43 and 29—1—43 and decree dated 12—2—43 of Bell, J., and passed in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. No. 247/1936.

L. Krishna Das and T. C. A. Anandalwar for Appellants.

V. S. Rangachari for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—The defendants 3 and 4 are the appellants and the plaintiff the respondent. There is a long family history relating to these parties which it is unnecessary to discuss. A decree of Gentle, J., dated the 4th October, 1940, provided *inter alia* that a partnership, the subject matter of the suit, should stand dissolved as and from the 20th March, 1936 and that the suit should be referred to the Official Referee to take the following accounts:

(a) an account of the credits, property and effects belonging to the partnership;

(b) an account of the debts and liabilities of the partnership; and

(c) an account of the dealings and transactions between the said partners from the 29th November, 1931 to the 20th March, 1936.

There was an appeal against the judgment and decree of Gentle, J., and it is sufficient to say that by a judgment, dated the 9th August, 1943, the appeal against the judgment of Gentle, J., was dismissed by the Chief Justice and Lakshmana Rao, J. The result therefore was that the decree of Gentle, J., having been confirmed, the matter went to the Official Referee to be dealt with in the terms of the decree. The Official Referee heard the matter and it will be seen that in dealing with the subject-matter of the reference he had to consider some complicated questions of law apart from pure questions of accountancy and arithmetic. After numerous hearings his report was finally signed on the 5th January, 1942 and in due course it came before our learned brother, Bell, J., on the 25th January, 1943. It appears from the learned Judge's judgment—and this is confirmed by learned counsel who now appear before us—that a contest took place before the learned Judge with regard to the objections and cross-objections filed by the respective parties. The judgment of the learned Judge was as follows:

“I am obliged for being referred to the case in *Manicka Mudaliar v. Andalammal*, which shows so clearly the scope and limits of the Official Referee's duties. In this case the judgment of Mr. Justice Gentle and his findings are in my respectful view clearly unequivocal. His directions as to what the Official Referee was to do appear to admit of no doubt whatever. Being so guided, the Official Referee has investigated the matter and I think there were enough materials before him on which he could come to a con-

*O.S.A. No. 31 of 1943.

1. (1940) 1 M.L.J. 356; I.L.R. 1940 Mad. 636.

28th July, 1944.

clusion. I think he was entitled on that material to come to the various conclusions he did. The objections have been very fully and very well argued by counsel for the respective parties but on the whole I do not think that they are sustainable or should be sustained. I am not satisfied that the Official Referee either was wrong in his method of approach to the matters as to which he was asked to inquire or in the conclusions to which he came."

It would appear therefore that the learned Judge took the view that unless it could be shown that there was no evidence before the Official Referee or that he had dealt with the case in some manner apparently wrong or illegal, no attack could be made upon his findings.

It is true, as those who had experience of the Original Side twenty years ago know, that there was at one time an idea in that Court that findings of fact of the Official Referee could not be attacked unless it could be shown that they were based on no evidence. That view however has long ceased to obtain and it is quite clear that a finding of the Official Referee can be attacked just as any other finding can be attacked. This has been emphatically stated by Venkatasubba Rao, O.C.J., and Venkataramana Rao, J., in O.S.A. No. 61 of 1934. The attention of Bell, J., was not drawn to this judgment. The case of *Manicka Mudaliar v. Andalammal*¹, to which the learned Judge referred, as he rightly observed, deals with the scope and limits of the Official Referee's duties; but nowhere can any authority be found for the proposition that his findings when within that scope and according to that duty cannot be attacked in appeal as any other finding. The extent to which a Court in fact would interfere in matters of accounts is of course according to the view which the individual Judge takes.

In this case however, we have before us an appeal which involves the investigation into questions of fact. The learned Judge while confirming the Official Referee's report has unfortunately given no reasons except as above stated. Consequently this appeal is actually before us as an appeal direct from the Official Referee and the judgment which we should give would be the judgment which should be given by the Original Side Judge. Twenty of the thirty grounds of appeal before us are directed to the Official Referee's report. The view we generally take on this matter is that for however long a time it was actually heard it has never been decided. We have no alternative except to allow this appeal by setting aside the judgment of the learned Judge and directing the whole matter to go back to the Original Side to be heard and decided on the merits with reasons for the findings. The costs of this appeal will be in the discretion of the learned Judge, who finally hears the reference from the Official Referee. As this matter has been considerably delayed already, we have no doubt that the Original Side Judge will give it his earliest attention. The court-fee on the appeal will be refunded.

The payment of Rs. 300 a month to the respondent will continue until the decree of the Original Side Judge.

K.C.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Muvvala Nagendrudu, and another

.. *Petitioners**

v.

Meduri Venkata Raghavayya and another

.. *Respondents.*

Defence of India Rules (1939), Rule 81 (4)—Collector's Notification directing licensee to issue receipts and to exhibit list of maximum prices of kerosene fixed by Collector—Sale of kerosene by retail dealers—No notice board indicating prices etc.—Whether offence—"Licensee" refers to wholesale dealers only.

1. (1940) 1 M.L.J. 356; I. L. R. 1940 Mad. 636.

*Criminal Revision Cases Nos. 863 and 864 of 1943.
(Criminal Revision Petitions Nos. 809 and 810 of 1943.)

14th July, 1944.

A notification issued by the Collector had directed licensees dealing in kerosene to issue receipts in respect of sales and to exhibit lists of maximum prices of kerosene fixed by the Collector. Where retail merchants vending kerosene were prosecuted under rule 81 (4) of the Defence of India Rules for not issuing receipts as prescribed and for not putting up a board notifying the prices and were convicted,

Held, that the conviction ought to be set aside as it is only wholesale dealers that have to take out a licence and they alone would be covered by the expression "licensee" in the notification.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate, Ongole, dated 28—8—43, and in C. C. No. 69 and 70/43, respectively.

• *M. S. Ramachandra Rao and B. S. Ramachandra Rao* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—These two cases arise out of C. C. Nos. 69 and 70 of 1943 on the file of the Joint Magistrate, Ongole. The petitioners in these two cases were retail merchants dealing in kerosene in Santharavur, Bapatla taluk. I have heard these cases together as the question at issue in both is the same. In both the charge was that the accused were guilty of an offence punishable under the Defence of India Rules as they did not issue receipts for the sales of kerosene by them and did not exhibit any board notifying the price at which the oil was sold. There was also a charge for not having kept measuring vessels. But no finding has been given on that charge and there has been no conviction with regard to that.

The notification for the disobedience of the provisions of which these petitioners were prosecuted under rule 81 (4) of the Defence of India Rules was a notification issued by the Collector of Guntur. It is contended that that notification deals only with wholesale dealers and not with retail dealers and as the petitioners were only retail dealers they could not be said to have contravened the provisions of that notification. The notification is D. Dis. No. 1087 of 1943, dated the 15th May, 1943 and paragraph 3 of that notification runs thus,

"The licensee shall issue to every customer a correct receipt giving the name, the licence number, the date of the transaction, the quantity sold, the rate at which sold and the total amount charged and shall keep a duplicate of the same to be available for inspection on demand by any officer authorised by the Collector."

Paragraph 2 runs thus,

"Every licensee shall display and keep displayed in a prominent position in his shop or other place of business a copy of the list of maximum prices of kerosene fixed by the Collector and a copy of the correct list of stocks held by him."

The use of the expression "licensee" clearly indicates that it is only persons who have to take a licence and who have a licence that are to comply with the provisions of these two paragraphs. It is not pointed out that there is any notification or rule framed which would require retail dealers in kerosene to take out licences and it is stated by the learned Public Prosecutor that he is not able to point out any notification or rule which would necessitate retail dealers taking licences. Consequently, it cannot be said that the petitioners in these two cases had contravened the provisions of the notification referred to above.

The convictions of the petitioners in both these petitions are set aside and they are acquitted. The fines, if already collected, will be refunded.

K.C.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Achanta Ramabrahmam and others

.. Petitioners.*

Special Criminal Courts Ordinance (II of 1942)—Special Magistrate tendering pardon under section 337 of the Criminal Procedure Code (V of 1898)—Power to continue the trial—Not bound to commit case to Special Judge or Sessions Court under section 337, clause (2) (a) of the Code.

Criminal trial—Evidence of accused against whom case was withdrawn—Sufficiency as corroborative evidence of approver to sustain conviction.

A Special Magistrate functioning under Ordinance II of 1942 had power to continue to try a case before him even after he had tendered a pardon under section 337 of the Criminal Procedure Code. He was not bound to commit the case to the Sessions Court or the Special Judge under clause (2) (a) of section 337 of the Code.

A conviction based on the evidence of one approver supported by that of another approver or person in the position of an approver or accused person against whom the case has been withdrawn is not illegal.

In re, *Rajagopalan*, (1943) 2 M.L.J. 634: I.L.R. 1944 Mad. 308 (F.B.), *relied on*.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgments of the Court of Session of the West Godavari division at Ellore, dated 18—9—43 and passed in C. A. No. 157 and 148/43 preferred against the judgment of the Court of the Special Magistrate of Gudivada, dated 24—12—42 and passed in C. C. No. 93 of 1942.

A. Lakshmayya for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The only substantial question which arises in these criminal revision cases is whether the Special Magistrate functioning under Ordinance II of 1942, acted illegally in continuing to try the case before him after he had tendered a pardon under section 337 of the Criminal Procedure Code. The argument is that as the pardon was tendered by the Magistrate by whom the case was being tried, he had no other option but to commit the case to the Sessions Court or the Special Judge under clause (2) (a) of section 337 of the Code. The learned Public Prosecutor meets this argument with the contention that under section 11 (1) read with section 6 (1) of Ordinance II of 1942, the warrant procedure prescribed in the Criminal Procedure Code is made applicable to the trial of special cases under the Ordinance subject to the limitation prescribed by section 27 of the Ordinance, which is in these words:

“The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by special Criminal Courts constituted under this Ordinance.”

Under section 6 (1) of the Ordinance a Special Judge takes cognizance of an offence without the accused being committed for trial in the ordinary way and, therefore, to this extent clause (2) (a) of section 337 of the Criminal Procedure Code is inconsistent with the provisions of the Ordinance. To hold otherwise would mean that no trial under the Ordinance could take place according to its provisions whenever a pardon was tendered during the course of the trial. Under Ordinance XIX of 1943 a sentence passed by a Special Magistrate in the exercise of his powers under Ordinance II of 1942 shall continue to have effect “as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure by a Sessions Judge or an Assistant Sessions Judge or a Magistrate of First Class, respectively exercising competent jurisdiction

*Cr. R. C. Nos. 878 and 879 of 1943.
(Cr. R. P. Nos. 824 and 825 of 1943).

under the said Code." The argument that the Special Magistrate should have proceeded under clause (2) (a) after tendering a pardon has to be rejected.

The second point taken is that the conviction on the evidence of one approver supported by that of a second approver is illegal; but this is opposed to the decision of the Full Bench in the case of *In re, Rajagopalan*¹. In the present case the corroborative evidence did not come from another approver in the strict sense of the word, but from an accused against whom the case was withdrawn and who was later placed in the dock, examined and cross-examined on oath as a prosecution witness in the usual way. In the case cited it was held that an approver's evidence is admissible under the Indian Evidence Act, and, if accepted, is sufficient to support a conviction, but whether it should be accepted without corroboration is quite a different matter and that unless the case is a very exceptional one, an accomplice's evidence should not be accepted as being sufficient. In the present case there is the evidence of P.W. 9, who, although not an approver, may be said to be in the position of an approver, or a co-accused; but in the light of this decision it cannot be said that the conviction is illegal. The evidence of the approver and the corroborating witness has been carefully considered by the Special Magistrate and the learned Sessions Judge. In an attempt to get over this difficulty, Mr. Lakshmayya has argued that the case is not such an exceptional one to warrant the acceptance of an approver's evidence, and he has attempted to test the findings of fact by both the lower Courts; but these findings are not open in revision.

Finally the severity of the sentences has been challenged but it cannot be said that for sabotage of the kind committed by the accused the sentences are in any way excessive. In any event the major portions of the sentences have been worked out and there is no necessity for any interference.

Both the petitions are dismissed.

K.S.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

G. Srinivasa Ayyangar

*Petitioner**

v.

Ramasami Ayyangar and another

Respondents.

Criminal Procedure Code (V of 1898), section 195 (1)—Scope—Amin making false return on execution process—Offence under section 193 as well as under section 167 of the Penal Code (XLV of 1860)—Complaint by Court—Necessity for—Cannot be avoided by making complaint for offence under section 167 of the Penal Code—Distinction between sections 167 and 193.

An amin making a false return on an execution process entrusted to him in the course of judicial proceedings commits an offence punishable under section 193 of the Indian Penal Code. A complaint in respect of such an offence must be made by the Court under section 195 (1) of the Code of Criminal Procedure and a complaint at the instance of a party will not be maintainable. Though the act complained of may also constitute an offence under section 167 of the Indian Penal Code a complainant cannot avoid the provisions of section 195 of the Code of Criminal Procedure by making his complaint for a lesser offence for which a complaint by the Court is not necessary.

Whereas section 167 Indian Penal Code relates to the incorrect preparation of a public record as such, section 193 applies when the record forms part of the records of a judicial proceeding.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the (Additional) First Class Magistrate of Kumbakonam in C.C. No. 327 of 1943.

1. (1943) 2 M.L.J. 634 : I.L.R. 1944 Mad. 308 (F.B.).

*Cr. R. O. No. 148 of 1944.

(Cr. R. P. No. 141 of 1944).

C. D. Venkataraman for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*), on behalf of the Crown.

P. Chandra Reddi and *R. Rangachari* for Respondents.

The Court made the following

ORDER.—The first accused is an amin who is alleged to have intentionally made a false return on an execution process entrusted to him at the instigation of a party to the litigation with intent to cause injury to some other persons, and the question which now arises for decision is whether this was an offence punishable under section 167 or section 193 of the Indian Penal Code. If the former section is applicable then no complaint is required under section 195 (1) (b) of the Code of Criminal Procedure; but if the latter section is applicable, then the complaint at the instance of a party is not maintainable.

The process was issued in the course of proceedings in execution of a decree of a District Munsif's Court and the execution proceedings were adjourned pending the return of the process. It was the amin's duty to remove an offending obstruction on the property in suit and to put the decree-holder in possession before returning the process to the Court; but he did neither of these things, and he returned the process with a false report that he had, in fact, removed the obstruction and placed the party in possession.

According to the rules contained in Chapter II, Part I, (Volume II) of the Civil Rules of Practice read with Order 21, rule 25 of the Code of Civil Procedure, the amin is required to endorse on the process the manner of its service or execution and, when returning it to the Court, he has to make an affidavit of his return, for which purpose Nazirs, Deputy Nazirs and Assistant Nazirs are empowered to administer the oath. It is therefore, clear that the process server or amin is, under Order 21, rule 25 of the Code of Civil Procedure and the relevant rules of the Civil Rules of Practice, bound by an express provision of law to state the truth and to make an affidavit as to the mode of his return. This brings him within the scope of section 191 of the Indian Penal Code and as the execution warrant or process arose in the course of a judicial proceeding and forms part of the record of those execution proceedings the offence committed by the amin comes under section 193 of the Indian Penal Code. The offence also appears to come under section 167 of the Indian Penal Code, which does not require the complaint of the Court under section 195 (1) (b) of the Code of Criminal Procedure, but there is ample authority in support of the proposition that a complainant cannot avoid the provisions of section 195 of the Code by making his complaint for a lesser offence for which a complaint by the Court is not necessary. The distinction between section 167 and section 193 of the Indian Penal Code seems to be that whereas the former section relates to the incorrect preparation of a public record as such, the latter section applies when the record forms part of the records of a judicial proceeding, as it does in the present case.

In the result, I find that the view taken by the learned Magistrate that the complaint is not maintainable is correct and the revision petition is dismissed.

H. S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Anumula Achiah

.. Appellant*

v.

Perumalla Papiah and others

.. Respondents.

Provincial Insolvency Act (V of 1920), section 78—Suit on promissory note pending insolvency proceedings—Promisor member of a joint family—Promisor and his brother adjudged insolvents—Liability of their sons to pay the debts—Limitation.

A suit was filed in 1941 to recover the amount due on a promissory note executed in 1925 by the 1st defendant in favour of the plaintiff. Defendants 1 to 6 were members of a joint family, the 2nd defendant being the brother and defendants 3 to 5 the sons of the 1st defendant. The 6th defendant was the son of the 2nd defendant and the 7th defendant was the Official Receiver who was impleaded as the 1st defendant, was adjudged insolvent and the insolvency had not yet been annulled. The plaintiff sought to make the sons liable for the debt, by reason of the rule of pious obligation and claimed that so long as the claim against the father was alive the suit against the sons would also be in time. The trial Court and the lower appellate Court held that section 78 of the Provincial Insolvency Act would not apply as according to them that section enables a creditor to deduct the time between the date of the adjudication and the date of annulment only if the suit was filed after annulment, and that if the suit was filed before annulment the ordinary period of limitation applied and the suit would be barred.

Held, that the provision in section 78 that the period between the date of the adjudication and the date of the annulment should be excluded, means that during that interval the cause of action was not barred. The provision is not that on the happening of the latter event a new right is created, but the provision is one for providing for the exclusion of the period between two events and as such the suit is neither premature nor barred by limitation.

Official Receiver, Guntur v. Lalchand Kushalchand, (1942) M.W.N. 470; *Gaekwar Baroda State Railway v. Muhammad Habibullah*, (1934) I.L.R. 57 All. 751 and *Forbes and others v. Smith*, (1855) 11 Exch. 161; 156 E.R. 786 referred to.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool in A.S. No. 161 of 1942 (A.S. No. 49 of 1942 on the file of the District Court, Kurnool) preferred against the decree of the Court of the District Munsif of Kurnool in O.S. No. 42 of 1941.

Kasturi Seshagiri Rao and Kasturi Sivaprasada Rao for Appellant.

J. V. Srinivasa Rao for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this second appeal is whether the suit is either premature or barred by limitation. The suit is filed to recover a sum of Rs. 600 borrowed from the plaintiff by the first defendant Papiah on the 3rd February, 1925, with interest. Defendants 2 to 6 are the co-parceners of Papiah. The second defendant is his younger brother and defendants 3, 4, and 5 are the sons of the first defendant Papiah and the sixth defendant is the son of the second defendant. These are respondents 1 to 6 in the second appeal. As Papiah was adjudged an insolvent the Official Receiver of Kurnool has been added as the seventh defendant and he is the seventh respondent in the appeal. The suit was filed on the 11th February, 1941, and it is said that the suit is not barred by reason of the insolvency proceedings in I.P. No. 27 of 1927 in which the first defendant Papiah was adjudged an insolvent and by reason of the fact that those proceedings are still pending. Second defendant Narasimiah was also adjudged an insolvent in I.P. 24 of 1929. That also is said to be pending. The plaintiff says that he proved his debt in the insolvency and that the sons of the first and second defendants are liable to pay the debts of their father by reason of the rule of pious obligation and that so long as the claim against the father is alive, the suit against the sons is also in time. The first Court held that as there has been no annulment of the adjudication of the first and second defendants, section 78 of the Provincial Insolvency Act which was pressed into service by the appellant would not apply as in his view that section enables a creditor to deduct the time between the date of the adjudication and the date of the annulment only if the suit was filed after the annulment. He also took the view that if the suit was filed before the annulment of the adjudication the ordinary period of limitation applied and the suit would be barred. Under the circumstances he allowed the plaintiff to withdraw the suit with liberty to file a fresh suit after the adjudication is annulled. The lower appellate Court has in substance upheld this view.

In second appeal it is urged that the view taken by the lower Courts is wrong and that the suit is in time. In the alternative it is said that there are two prayers in the plaint (1) a declaration that the entire debt of the suit amount, Court expenses and subsequent interest was incurred by the defendants 1 and 2 for the benefit of the family of all the defendants and (2) enabling the plaintiff to recover the amount from the defendants' joint family properties and also from the properties belonging to the shares of defendants 3 to 6. This is a prayer which we do not generally come across but it was necessitated by the following circumstances. The Official Receiver of Kurnool who was appointed receiver in both the insolvencies had to take various proceedings in order to set aside several alienations which had been effected shortly before the insolvency with a view to shield the property from the creditors. After succeeding in those attempts, the Official Receiver advertised the properties for sale. But on the eve of these sales, he received a notice from the two sons of Papiiah on the 8th September, 1936, whereby they declared that they have 2/9th share in the joint family estate, that the debts contracted by the insolvent were not binding on their shares and called upon the Official Receiver not to sell the 2/9th share and to deliver possession of the same to them. On 14th September, 1936, those two sons filed a partition suit O.S. No. 1055 of 1936 in the Court of the District Munsif of Kurnool for partition and separate possession of their share. In that suit they impleaded not only the other non-insolvent members of the coparcenary entitled to the respective shares, but also the insolvents and the Official Receiver. An attempt was made by the Official Receiver to sell the shares of the sons as well while the suit was pending, but the Official Receiver was properly restrained by an injunction from selling anything beyond the shares of the insolvents. The shares of the insolvents were accordingly sold by the Official Receiver and a dividend was declared and the plaintiff in this suit also received a dividend. The Official Receiver contested the partition suit O.S. No. 1055 of 1936 and pleaded that the various debts contracted by the insolvents were binding on the sons, the plaintiffs, that the debts were neither illegal nor immoral and that the creditors were also necessary parties to the suit. On these contentions an issue was raised, namely, whether the creditors of the insolvent were necessary parties to the suit. The Official Receiver also filed a petition requesting the Court to frame an additional issue in the suit whether the debts contracted by the insolvents were or were not binding on the sons. But the plaintiffs contended that the additional issue was unnecessary and that it did not arise in the suit. The District Munsif dismissed the petition saying that as the plaintiffs had alleged in the plaint that the debts incurred by the insolvents were avyavaharika debts, they were bound to prove the same in the suit. But after saying this he proceeded to add that the creditors were not parties to the suit and that any declaration regarding the illegal or immoral nature of the debts would not be binding on the creditors. A revision petition filed by the Official Receiver in this Court proved ineffective. The Official Receiver ought to have pressed for an adjudication of the question as to what were the debts binding on the whole family and for provision being made for the discharge of all the debts binding on the plaintiffs in that suit before a partition was made of the family properties. It was not really necessary to have the creditors as parties to that suit as the Official Receiver represented them. It is very unfortunate that the Official Receiver did not press upon the attention of the Court that an enquiry should be made as to what debts were payable by the plaintiffs and that provision should be made for the discharge of those debts before effecting a partition. One of the creditors applied in the Insolvency Court under section 4 of the Provincial Insolvency Act in M.P. 460 of 1940 asking the Court to decide that the debts included in the schedule of creditors were not incurred for illegal or immoral purposes and to direct the Official Receiver to sell the shares of the

sons as well. The Insolvency Court said that the Official Receiver had failed to take advantage of the partition suit to have this question tried and that the Insolvency Court had no right to sell the sons' shares after the partition suit had been filed. It was also observed that each creditor would have to file a suit to enforce the pious obligation of the sons to discharge the father's debts. The present suit was then filed.

Now it is said that so long as the adjudication is not annulled the provisions of section 78 do not apply and that as things stand at present, the suit should be dismissed as barred, and that if the suits are filed after the adjudication is annulled, they may have a remedy against the sons. Before the Provincial Insolvency Act, V of 1920, there was no section corresponding to section 78 of the present Act. Under the Act as it then stood it was held by this Court in *Ramaswami Pillai v. Govindaswami Naicker*¹, that an adjudication does not prevent time running and that limitation is not suspended by reason of the adjudication. If a creditor did not file a suit with the necessary leave of the Court under section 16 of the Act of 1907 and the adjudication was annulled before the administration was complete, the creditor found that his remedy became barred if by the date of the annulment and by the time he filed a suit, the suit upon the original cause of action was barred. It is to remedy this situation that section 78 was enacted. Does section 78 which enables the deduction of time between the date of the adjudication and the date of the order of annulment enable a creditor to say that a suit filed before annulment is not barred? In *Official Receiver, Guntur v. Lalchand Kushalchand*², this Court had to deal with the effect of section 78, clause (2) of the Provincial Insolvency Act. The plaintiff got a decree on 16th December, 1930, against the father who was adjudged an insolvent. The adjudication was made in 1932. The decree-holder proved his debt in the insolvency. On the 31st August, 1936, the Insolvency Court annulled the adjudication. On the 24th September, 1936, one of the creditors applied praying for the revesting of the property in the Official Receiver. While that application was pending, the plaintiff filed an execution petition to attach the funds in the hands of the receiver and the attachment was made. A month later the Insolvency Court passed an order revesting the properties and the fund in question in the Official Receiver so that they could be utilised for the benefit of the creditors in the Insolvency Court. The Official Receiver claimed that the attachment made by the creditor was ineffective and the executing Court upheld that contention. Thereupon the suit which came up before the High Court was filed for establishing the plaintiff's right, to proceed against the fund attached which involved a setting aside of the order passed on the Official Receiver's claim. With reference to the father's share of the proceeds, it was held that even though there was a valid attachment prior to the revesting order, as an attachment does not create a charge, the decree-holder could not proceed against the father's share after the revesting order which amounted to a fresh adjudication and vested that share in the Official Receiver. Dealing with the sons' shares in the funds the learned Judges (Wadsworth and Patanjali Sastri, JJ.) said this:

"With reference to the sons' shares we have listened to very elaborate arguments, but the matter seems to us to be comparatively simple. It is well established that the attachment of the sons' shares in Hindu joint family property automatically prevents the father from exercising over those shares his power to sell the property and utilise the proceeds for the discharge of his own just debt. Similarly when the shares of the sons have been attached by a creditor before the father's assets vest in the Official Receiver, the vesting in the Official Receiver of the power of the father to dispose of his sons' shares for the payment of his own debts cannot enable that power to be exercised over the properties so attached. * * * It seems to follow that at the time of the revesting order, the sons' shares being

1. (1918) 36 M.L.J. 104.

2. (1942) M.W.N. 470.

under an attachment by the plaintiff, the revesting order would give to the Official Receiver no power to sell those shares or to use the proceeds of those shares for the satisfaction of the other debts of the father to the extent of the attachment."

Then they dealt with the question whether the claim of the plaintiff to execute his decree against the shares of the sons was barred by limitation. It was admittedly a decree against the father alone and the contention of the appellant was that so long as the claim was alive as against the father, it was also alive as against the sons. The learned Judges said this:—

"It was admittedly a decree against the father alone which was alive as against the father by reason of the provisions of section 78 of the Provincial Insolvency Act. . . . There is clear authority for the general proposition that when the debt is alive against the father it is alive against the son in the absence of special circumstances, such as that created by a renewal after a partition between the father and son or perhaps the position when the father and son were both defendants and the father alone was an insolvent against whom limitation is saved under section 78 of the Provincial Insolvency Act. But on the facts of the present case we have no doubt that the execution of the plaintiff's decree against the father by the attachment of the proceeds of the sale of the sons' shares was not barred by limitation."

In that case the execution petition was against the father and sons and the attachment was after the adjudication of 1932 annulled by the order of the 31st August, 1936. That would be a case to which section 78, clause (2) in terms applies and the period between the date of the adjudication and the date of the annulment has to be excluded. But the learned advocate for the appellant relies upon the reasoning of the learned Judges where they said:—

"There is clear authority for the general proposition that when the debt is alive against the father it is alive against the son in the absence of special circumstances,"

and on the observation that the decree before them was admittedly one against the father alone which was alive as against the father by reason of the provisions of section 78 of the Provincial Insolvency Act. The principle laid down by them appears to me to be this. If after an adjudication is annulled, a claim against the father is enforceable, it really means that all along during the pendency of the insolvency proceedings the claim against the father was alive. To put it in other words, it is not a new right that is created on the order of annulment, but it is the old right that is enforced in the suit or execution proceedings filed after annulment. The statutory provision that the time between the date of the adjudication and the date of the annulment should be excluded necessarily involves the position that during the interval, the claim was not really barred. If this is the correct principle, then it would follow that the claim against the sons can be enforced even during the insolvency of the father and as the requisite leave of the Insolvency Court has been obtained in this case, the further condition laid down by Wadsworth and Patanjali Sastri, JJ., that the creditors could proceed against the sons' share only with the leave of the Insolvency Court has been fulfilled.

The provision in section 78, clause (2) "other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28" really refers to the suit or application against the insolvent. If the creditor wanted to proceed against the sons, it appears to me that no leave of the Court was really necessary though I notice that Wadsworth and Patanjali Sastri, JJ., say that as it is the right against the father which is being enforced against the sons, leave of the Insolvency Court should be obtained even then. As observed by me that has been obtained in this case and it is not therefore necessary to go into that question further. The point to be determined is whether the provision that the period between two given events should be excluded does not necessarily mean that during that interval the cause of action was not barred. The provision is not that on the happening of the latter event a new right is created, but the provision is one providing for the exclusion of the period between the two events. Under the Limitation Act we

have got similar provisions in Part III beginning with section 12. Under section 12, clause (2) in computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded. Let us take a case where an application is filed for copies of both decree and judgment and while that application is pending, an appeal is filed owing to an urgency beyond the prescribed period for an appeal computing the time from the date of the judgment. Can the appeal be said to be barred? Very often one gets a copy of the decree alone while the copy of the judgment is not given and files an appeal, though really sometimes an appeal is filed without certified copies of either the decree or the judgment with a request to excuse their production and for permission to file them later on. If such an appeal is filed during the pendency of the application for grant of the copies, I should hesitate very much to say that the appeal is barred if it happened to be filed beyond the prescribed period for an appeal counting it from the date of the judgment. The decision of the Allahabad High Court in *Gaekwar Baroda State Railway v. Muhammad Habibullah*¹ decides that the appeal would in such cases be in time. Similarly section 13 provides that in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded. If after one year after the cause of action accrues, the defendant leaves British India and is absent and the suit is filed more than three years after the cause of action arose, but at a time when the defendant had not yet returned from abroad, section 13 would enable the plaintiff to say that his suit is not barred. The decision in *Forbes and others v. Smith*² is in point. At the time when the cause of action arose in that case, the defendant was beyond the sea and not in the United Kingdom of Great Britain and Ireland and more than six years elapsed after that date. The defendant did not return to the United Kingdom and continued in foreign parts beyond the seas. The suit was filed more than six years after the cause of action arose, that being the period of limitation prescribed by 21 Jac. 1. chapter 16, section 3, and before the return of the defendant to the United Kingdom. Under 4 Anne, c. 16:—

“if any person or persons against whom there shall be certain causes of action shall be, at the time the cause of action accrued, beyond the seas, then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons, after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made in 21 Jac. 1.”

The defendant took up the question by way of demurrer and argued that the enactment made the return of the defendant and the commencement of the action within six years thereafter conditions precedent to the maintainability of the suit. Chapter 16, section 7 of 21 Jac. had provided for the case of the plaintiff being out of the United Kingdom. The learned Judges dealt with the question this way:—

“We ought to put the same construction on the 4 Ann, c. 16, section 19, as has been put on the 21 Jac. 1, c. 16, section 7 and the case of *Townsend v. Deacon*,³ certainly justifies a departure from the strict language of the statute, because if an action may be brought by the personal representative of a person who has never returned from abroad, it follows in this case, that although the defendant has never returned he is liable to be sued, yet that is inconsistent with the notion that the 4 Ann, c. 16, section 19, gives a new cause of action on the defendant's return. No doubt the argument of Mr. Quain is, as to the letter, perfectly correct; and if the statute is to be construed without reference to the subject-matter or other statutes and decisions, and without regard to the construction which should be given to it in order to make it consistent with law and

1. (1934) I.L.R. 57 All. 751.

2. (1855) 11 Exch. 161 : 156 E.R. 786.

3. (1849) 3 Exch. 706.

common sense, his argument ought to prevail. If the mere language is to be taken without reference to its meaning and general intention, it would certainly seem as if the being at liberty to bring an action after the defendant's return was inconsistent with the power to bring it before his return. But that is not the mode of ascertaining the meaning of the legislature, for *Townsend v. Deacon*¹ proves that a plaintiff's executor may sue in this country though the plaintiff never returned; and it follows by necessary analogy that, though this defendant had never returned, yet if any one had proved his will the plaintiff might have sued that personal representative; and it would be very strange if a personal representative might sue and be sued, and yet the party himself could not. * * * The construction of the statute which I adopt is this:—the plaintiff shall have, for the purpose of suit, any time not exceeding six years from the return of the defendant to this country; but if he chooses to sue the defendant before his return, he may take that course".

(Per Pollock, C.B.).

Alderson, B., said this:—

"According to the true construction of the statute, the one party is not barred of his action unless the other party has returned and six years have elapsed since his return".

Platt, B., added that in construing these statutes, one must see what is the limit within which an action may be brought. In *Lightwood on Time Limit of Actions*, page 295, the same position is laid down. The above decision applies to cases under section 13 of the Indian Limitation Act. There is this difference that under the English law the defendant must have been abroad at the time when the cause of action arose but under the Indian law, there is no such provision. There are other differences which are not material. Under section 78 of the Provincial Insolvency Act, the same result would I think follow. I hold that section 78 which provides for the exclusion of the period between the date of the adjudication and the date of the annulment necessarily involves the conclusion that the cause of action cannot be said to have been barred during the interval.

I set aside the decrees of both the lower Courts and remand the suit for trial on the other issues to the Court of first instance. It is said that no evidence was taken on the other issues. It is regrettable that a suit on a promissory note of 1925 should still be pending. But the lower Courts took the unfortunate step of deciding the case on a preliminary ground without recording evidence on all the questions as the trial Courts ought to do. Now that their decision on the question of limitation is found to be incorrect, there is the further delay caused by the trial on the other questions which has to take place hereafter. The respondents will pay the costs of the appellants both here and in the lower appellate Court. The costs in the trial Court will be provided for in the revised judgment of that Court. Court-fee paid on the memorandum of second appeal will be refunded.

• Leave refused.

V.P.S.

Suit remanded.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Nalam Ramayya and others

.. Appellants*

v.

Nalam Achamma

.. Respondent.

Co-sharers—Hindu joint family—Alleged partition—Deed being inadmissible for want of registration—Suit by one co-sharer against another for trespass—Maintainability—Suit for general partition as proper remedy—Proof of partition by other evidence—Permissibility.

The widow of a deceased Hindu co-parcener instituted a suit against other members of the family for recovery of certain items of properties which she alleged had fallen to the share of her deceased husband on partition. The plaintiff's case was that the partition was effected in March, 1934, that her husband obtained possession of the properties which were allotted to him and remained in possession until his death in August, 1938, and that after his death his brothers trespassed on the land and dispossessed her. The defendants denied that there had been a partition but it transpired in the course of the case that the partition had taken place and in that connection a document had been drawn up and signed by the parties. It was contended that although the deed of partition was inadmissible in evidence for want of registration the plaintiff was entitled to prove the partition by other evidence.

Held, that where a partition deed was inadmissible in evidence for want of registration the Court could only regard the property as still belonging to the joint family. And the co-owner in sole enjoyment could not in such a case maintain a suit for trespass against the other co-owners who had disturbed his possession. He could only bring a suit for partition of all the properties owned in common or for joint possession with his co-owners.

There is nothing in the judgment in *Varada Pillai v. Jeevgrathnammal*, (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.) to support the proposition that an agreement which cannot be proved by reason of the fact that it has not been registered can be proved by other evidence. All that it amounts to is that an unregistered document can be examined to see under what circumstances a person came into possession.

Decision of Patañjali Sastri, J., in *Veeraraghava Rao v. Gopala Rao*, (1941) 2 M.L.J. 707 approved.

Ramu Chetty v. Panchammal, A.I.R. 1926 Mad. 402 disapproved.

Appeal against the decree of the Court of the Subordinate Judge, Narsapur in A.S. No. 97 of 1942 preferred against the decree of the Court of the District Munsif of Bhimavaram in O.S. No. 269 of 1938.

Kasturi Seshagiri Rao and M. Srinivasa Rao for Appellants.

P. Somasundaram and P. Suryanarayana for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit instituted by the respondent in the Court of the District Munsif of Bhimavaram to recover from the brothers of her deceased husband properties which she alleged had fallen to his share on partition. The properties in suit admittedly had formed part of the estate of the joint family which consisted of the deceased, his brothers Ramayya and Appanna (the first and second appellants) and Appa Rao (the third appellant), who is the son of the second appellant. The plaintiff's case was that the partition was effected on the 1st March, 1934. Her husband obtained possession of the properties which were allotted to him and remained in possession until his death on the 11th August, 1938. After his death his brothers trespassed on the land and dispossessed her. The defendants denied that there had been a partition, but it transpired in the course of the case that partition had taken place and in this connection a document had been drawn up and signed by the parties. The document was not produced. On the evidence led before him the District Munsif held that it merely comprised lists of the properties which had been allotted to the respective coparceners. He also accepted the plaintiff's case in other respects and consequently decreed the suit. On appeal the Subordinate Judge held that the document did constitute a deed of partition which required registration, but that the plaintiff was in law entitled to prove a partition by other evidence, which she had done. Consequently he concurred in the decree passed by the District Munsif. The defendants have appealed. The appeal raises the question whether the Subordinate Judge was right in holding that the partition could be proved by evidence apart from the deed and the case has been placed before a Full Bench as the decisions of this Court relating to this question reveal a conflict.

In *Ramu Chetty v. Panchammal*¹, Kumaraswami Sastri, J., sitting with Venkatasubba Rao, J., held that, where a partition had taken place under a

1. A.F.R. 1926 Mad. 402.

deed and the deed could not be proved for want of registration, the fact of partition could be proved by other evidence, namely, the conduct of the parties in their dealings with each other and with regard to the specific items of property. He quoted the decision of the Privy Council in *Rajangam Iyer v. Rajangam Iyer*¹, as an authority for the proposition that an unregistered partition deed can be put in evidence for the purpose of proving a division of status. The judgment of their Lordships did not say this, but in *Subbarao v. Mahalakshamma*², a Bench of this Court held that regard can be had to the terms of an unregistered deed of partition when it is merely a question of deciding whether there has been a division of status, and the correctness of that decision has not been questioned.

In *Varada Pillai v. Jeevarathnammal*³, the Judicial Committee held that unregistered documents could be examined with a view to ascertaining the nature of the possession. The question there was whether there had been a valid gift of immovable properties and whether the donee had acquired a title by adverse possession. The documents were certain petitions which had been presented to the Collector, who was asked to register the properties in the name of the donee. Their Lordships said that as a gift of immovable property is required to be made by a registered deed the petitions could not be used as evidence of title, but it was permissible for the Court to look at them in order to ascertain the nature and character of the possession held by the person named in the petitions. In delivering the judgment of the Board, Viscount Cave observed:

“In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt”.

The decision in effect was that, as the property had come to her in the circumstances indicated and as she had held it for twelve years, she had obtained title by adverse possession.

There is nothing in the judgment in *Varada Pillai v. Jeevarathnammal*³, to support the proposition that an agreement which cannot be proved by reason of the fact that it has not been registered can be proved by other evidence. All that it amounts to is that an unregistered document can be examined to see under what circumstances a person came into possession. This is quite a different matter, and lends no support for the opinion of Kumaraswami Sastri, J.

The learned advocate for the respondent also relies on the judgment of Ramesam, J., in *Akoblachari v. Thulasi Ammal*⁴. It would appear that Ramesam, J., did regard the remarks of Kumaraswami Sastri, J., with favour, but it is not quite clear whether he intended to go quite so far.

An opinion emphatically opposed to that expressed by Kumaraswami Sastri, J., in *Ramu Chetti v. Panchamma*⁵, was expressed by Patanjali Sastri, J., in *Veeraraghava Rao v. Gopalrao*⁶, where the facts were almost identical with the facts of the present case. There Patanjali Sastri, J., held that, where a deed of partition is inadmissible by reason of the fact that it has not been registered, a co-sharer who happened to be in sole enjoyment of a particular property could not sue to eject another co-sharer who had disturbed his possession when he based his title on the partition deed. He could only bring a suit for partition of all the properties owned in common or for joint possession with his co-owners. The judgment of Patanjali Sastri, J., was approved of in an appeal filed under Clause (15) of the Letters Patent. I was a member of the Bench which heard that appeal.

1. (1923) 44 M.L.J. 745: L.R. 50 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).
 134: I.L.R. 46 Mad. 373 (P.C.).
 2. (1930) I.L.R. 54 Mad. 27: 59 M.L.J. 558.
 3. (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).
 4. A.I.R. 1927 Mad. 830.
 5. A.I.R. 1926 Mad. 402.
 6. (1941) 2 M.L.J. 707.

The question has been fully argued in the present case and we see no reason to doubt the correctness of the opinion expressed by Patanjali Sastri, J., in *Veeraraghavarao v. Gopalrao*¹. If the judgment of Kumaraswami Sastri, J., were to be accepted it would mean the overriding of the very emphatic provisions of section 17 of the Registration Act and section 91 of the Evidence Act which is not to be contemplated. As we have already indicated, there is nothing in the judgment of the Privy Council in *Varada Pillai v. Jeevaratnammal*², which in any way supports the case for the respondent. If it were a question of proving an oral agreement entered into after that embodied in the unregistered document evidence of subsequent conduct could, of course, be led in proof of the subsequent oral agreement, but not with regard to the earlier one. In the present case a division by metes and bounds took place before the execution of the partition deed.

As the property in suit admittedly had belonged to the joint family, the change in its character must be proved. As the agreement for partition cannot be proved, the Court can only regard the property as still belonging to the joint family. Moreover, as Patanjali Sastri, J., pointed out, one co-owner cannot maintain a suit for trespass against another co-owner.

For the reasons given, the appeal must be allowed with costs throughout.

B. V. V.

Appeal allowed.

FEDERAL COURT OF INDIA.

On appeal from the High Court of Judicature at Patna.*

PRESENT:—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Basanta Chandra Ghose and others

Appellants†.

v.

The King-Emperor

Respondents.

Restriction and Detention Ordinance (III of 1944), sections 6 and 10—Validity and scope of the provisions of—Government of India Act (1935), sections 102 and 223 and Schedule IX, section 72—Ordinance-making power—Scope of.

The Restriction and Detention Ordinance could not be assailed on the ground that under section 72 of the Ninth Schedule to the Government of India Act the Governor-General was not entitled to promulgate an Ordinance bearing upon "preventive detention for reasons connected with the maintenance of public order" because that is exclusively a provincial subject (List II, entry 1). As the Indian Legislature is to-day by reason of a proclamation of emergency under section 102 competent to legislate both upon central subjects and upon provincial subjects, there is no justification for limiting the Ordinance-making power to List I and List III subjects.

It is not necessary that an Ordinance should set out in detail the nature of the emergency that has led to its promulgation. The provisions of section 10 of Ordinance III of 1944 cannot be said to be beyond the Ordinance making power of the Governor-General because the emergency described in the opening paragraph of the Ordinance did not postulate the necessity for such a provision.

As section 10 of the Ordinance does not purport to repeal section 491, Criminal Procedure Code, it is within the powers of the Ordinance-making authority. All that section 10 does is to interdict the High Court from exercising in a certain class of cases the power or jurisdiction conferred on it by section 491, Criminal Procedure Code. By so doing it does not offend against the provisions of section 223 of the Constitution Act. The Ordinance, by virtue of section 311 (6) of the Constitution Act would fall within the description "Act of the appropriate legislature" in section 223 of the same Act. Even if section 311 (6), is assumed not to refer to such an Ordinance, the result would only be that under section 223 the High Court would continue to have the same jurisdiction and powers "as immediately before the commencement of Part III of this Act" which at that time were expressly subject to the Governor-General's Ordinance making power under section 72 by reason of a clause to that effect in the Letters Patent.

It could not be maintained that clause (2) of section 10 of the Ordinance was valid and within the competence of the Ordinance-making authority to the full extent which

1. (1941) 2 M.L.J. 707.

285: I.L.R. 43 Mad. Mad. 244 (P.C.).

2. (1919) 36 M.L.J. 313: L.R. 46 I.A.

* The Judgment of the High Court is reported in I.L.R. 23 Pat. 475.

† CrI. Appeals Nos. III, IV, V and VI of 1944.

23rd May, 1944.

its language signified, even if it went further than clause (1) of that section. Some of the pending proceedings hit at by clause (2) of section 10 may raise questions of fact and their determination may wholly depend upon questions of fact and not upon any rule of law. A direction that such a proceeding is discharged is clearly a judicial act and not the enactment of a law. It is a direct disposal of the cases by the legislature itself. The effect of clause (2) of section 10 is to continue the deprivation of a subject's liberty and at the same time to deny him the opportunity of showing that his detention is not warranted by any statute or statutory rule.

The word 'such' in the expression 'every such order' in clause (2) of section 6 can only attract the qualification to be found in the opening words of clause (1) namely, 'order made before the commencement of this Ordinance under rule (26) of the Defence of India Rules'. The further qualification to be extracted from the reference there contained to the ground of invalidity arising out of the *ultra vires* character of rule 26 could not be imported into clause (2). Such a view as to the scope of clause (2) of section 6 would determine the ambit of the expression 'order having effect by virtue of section 6' in section 10. But it does not follow from this that the Court can no longer consider the validity of an order which on the face of it appears or purports to have been passed under rule 26. The Ordinance does not protect a document which is not really an 'order under r. 26' though it may appear on its face to be the order of an authorised officer.

No further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance III of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under rule 26 and now deemed to be made under Ordinance III or a new order purporting to be made under Ordinance III was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and India on the subject, other than the ground that rule 26 was *ultra vires*, section 10 of the Ordinance III will not prevent it from so finding. Such an invalid order though purporting to be an order, will not in fact be an 'order' made under this Ordinance or having effect by virtue of section 6 as if made under this Ordinance at all for the purpose of section 10.

M. N. Pal and *B. C. De*, Advocates of Patna High Court (with *S. R. Ghosal*, Advocate, Patna High Court) instructed by *Gurudayal Sahay*, Agent, for Appellant in Criminal Appeal No. III of 1944.

Raghubir Singh, Advocate, Federal Court, instructed by *Gurudayal Sahay*, Agent, for Appellant in Criminal Appeal No. IV of 1944.

M. N. Pal and *B. C. De*, Advocates of Patna High Court (with *S. R. Ghosal*, Advocate, Patna High Court) instructed by *Gurudayal Sahay*, Agent, for Appellant in Criminal Appeal No. V of 1944.

Raghubir Singh, Advocate, Federal Court, (*M. N. Pal*, Advocate, Patna High Court, with him) instructed by *R. C. Prasad*, Agent, for Appellant in Criminal Appeal No. VI of 1944.

Mahabir Prasad, Advocate-General of Bihar (with *R. J. Bahadur*, Advocate, Federal Court) instructed by *S. P. Varma*, Agent for Respondent (in all the four cases).

Sir Brojendra Mitter, Advocate-General of India (with *H. K. Bose*, Advocate, Federal Court) instructed by *K. Y. Bhandarkar*, Agent, appeared in response to notice issued to him under Order XXXVI, rule 1, F.C.R. 1942.

The Judgment of the Court was delivered by

The Chief Justice.—These are appeals by certain detenus against orders passed by the High Court at Patna dismissing applications filed by them or on their behalf for their release under section 491 of the Criminal Procedure Code. Two of the petitions, from which Criminal Appeals III and V arise, were dealt with by one Division Bench, in a judgment which has discussed the contentions urged in support of the petitions. The petitions in the other two cases were disposed of by two other Benches which have followed that judgment. On behalf of the Crown it was urged before the High Court that Ordinance III of 1944—which had been promulgated during the pendency of some of these petitions—had taken away the power of the Court to pass any order under section 491 of the Criminal Procedure Code in these cases. By way of reply to that

argument, the validity of the Ordinance was impugned on behalf of the detenus; certain contentions as to the construction and effect of the Ordinance were also advanced. The High Court upheld the objection raised on behalf of the Crown but granted a certificate under section 205 of the Constitution Act. In the main judgment under appeal, the learned Judges rejected the limited interpretation which counsel for the detenus sought to place on sections 6 (2) and 10 of the Ordinance. They also held that there was nothing to suggest that the Governor of Bihar had not duly passed the orders for detention. Before this Court, the objection based on the Ordinance has been relied on by the Advocate-General of Bihar and counsel for the appellants have urged several contentions both in respect of the validity of the Ordinance and in respect of its meaning and effect. It will facilitate the appreciation as well as the discussion of these arguments to begin with a brief narration of the circumstances that led to the promulgation of the Ordinance.

Immediately after the outbreak of the war, provision was made by an Ordinance (Ordinance V of 1939) promulgated by the Governor-General and by rules framed thereunder for the Administration taking all necessary measures to ensure the public safety and interest and the defence of British India. On September 29, 1939, an Act (Defence of India Act XXXV of 1939) was passed by the Legislature itself, making necessary provision in this behalf and the Ordinance was repealed. Section 2 of this Act enabled the Central Government to make rules for securing 'the defence of British India, the public safety, the maintenance of public order', etc. Clause (2) of this section contained some further provisions relating to the rules to be so made. One of the rules framed by the Central Government was rule 26 of the Defence of India Rules, enabling certain authorities to make orders for detention, if they were satisfied with respect to any particular person that it was necessary to make such an order with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, etc.

In *Keshav Talpade's case*¹ this Court held that rule 26 of the Defence of India Rules went further than the rule-making powers conferred by section 2 of the Act warranted. As it would have followed from this decision that persons detained at the time under orders passed on the basis of rule 26 must be released, the Governor-General promulgated Ordinance XIV of 1943 whose material provisions were—

Section 2.—For clause (x) of sub-section (2) of section 2 of the Defence of India Act, 1939 (XXXV of 1939), the following clause shall be substituted, and shall be deemed always to have been substituted, namely:—

"(x) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything;"

Section 3.—For the removal of doubts it is hereby enacted that no order heretofore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under section 2 of the Defence of India Act, 1939."

The validity and effect of Ordinance XIV of 1943 had to be considered by this Court in *Sibnat Banerjee's case*². The Court then indicated certain doubts

1. (1943) 6 F.L.J. 28 (F.C.).

2. (1943) 2 M.L.J. 468; (1944) F.C.

R. 1: 6 F.L.J. 151 (F.C.).

as to the validity of section 2 of the Ordinance, as it attempted to change the statute law with retrospective effect, but it upheld the validity of section 3, with the result that detention orders theretofore passed could no longer be impugned on the ground that rule 26 was not warranted by section 2 of the Defence of India Act.

The judgment of this Court in *Sibnath's case*¹ dealt with two other objections raised against the validity of the orders of detention then under consideration and the objections were upheld, in some instances unanimously and in other cases by a majority. One related to the authority who was to be satisfied as to the necessity for the detention, *viz.*, whether in the provinces it must be the Governor himself or it may be any person to whom certain classes of work may be assigned under section 59 of the Constitution Act; the other related to the nature and extent of the presumption to be made in favour of the 'validity and regularity' of orders for detention that had been passed under the invalid rule 26. The position taken up on behalf of the Crown in that case and in other cases before the provincial High Courts was that it was not necessary that the order should be the result of consideration in each case by the Governor and that every presumption must be made in favour of its validity and regularity.

This Court pronounced judgment in *Sibnath's case* on August 31, 1943; and Ordinance III of 1944 was promulgated on January 15, 1944. Roughly the purpose of the Ordinance may be described as three-fold:—

(i) to confer the power of detention, etc., by the Ordinance itself instead of by rules framed under the Defence of India Act *see* sections 4 and 5 of the Ordinance;

(ii) to limit the term of detention in the first instance, to provide for the review (by certain authorities) of the order of detention from time to time and to give opportunity to the detenu to make representation to the executive authorities against the order *vide* sections 7, 8 and 9; and

(iii) to enact a presumption in the Ordinance itself in favour of detention orders to preclude their being questioned in courts of law and to take away or limit the power of the High Court to make orders under section 491 of the Criminal Procedure Code in such cases *vide* sections 6 and 10.

As the third set of provisions are those calling for consideration in these cases, it will be convenient to set them out here, so far as they are material:—

"6. (1) No order made before the commencement of this Ordinance under rule 26 of the Defence of India Rules shall after such commencement be deemed to be invalid or be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said order was made be legally conferred by a rule made under section 2 of the Defence of India Ordinance, 1939 (V. of 1939), or under section 2 of the Defence of India Act, 1939 (XXXV of 1939).

(2) Every such order shall on the commencement of this Ordinance be deemed to have been, and shall have effect as if it had been, made under this Ordinance, and as if this Ordinance had been in force at the time the order was made:

Provided that section 7 and section 9 of this Ordinance shall apply in relation to any order made under clause (b) of sub-rule (1) of rule 26 of the Defence of India Rules as if that order had been made on the date of the commencement of this Ordinance, and section 8 of this Ordinance shall not apply to any such order."

"10. (1) No order made under this Ordinance, and no order having effect by virtue of section 6 as if it had been made under this Ordinance, shall be called in question in any Court, and no Court shall have power to make any order under section 491 of the Code of Criminal Procedure (V of 1898), in respect of any order made under or having effect under this Ordinance or in respect of any person the subject of such an order.

(2) If at the commencement of this Ordinance there is pending in any Court any proceeding by which the validity of an order having effect by virtue of section 6 as if it had been made under this Ordinance is called in question, that proceeding is hereby discharged.

• 1. (1943) 2 M.L.J. 468: (1944) F.C.R. 1: 6 F.L.J. 151 (F.C.).

(3) Where an order purports to have been made by any authority in exercise of any power conferred by or under this Ordinance, the Court shall, within the meaning of the Indian Evidence Act, 1872 (1 of 1872), presume that such order was so made by that authority."

It will be noticed that clause (1) of section 6 substantially corresponds to section 3 of Ordinance XIV of 1943 but section 10 goes farther. Clause (1) of section 10 purports to deal with two classes of orders—(a) orders made under this Ordinance and (b) orders having effect by virtue of section 6 as if they had been made under this Ordinance. We are not concerned in this case with any order of the (a) category but only with orders falling under category (b). Clause (2) of section 10 is limited to orders under category (b). The words 'having effect by virtue of section 6 as if it had been made under this Ordinance' refer us back to clause (2) of section 6 which opens with the words 'every such order'. Lengthy arguments have been advanced before this Court as to the connotation of these words.

The validity of the Ordinance and its relevant provisions was questioned on several grounds. A broad contention was put forward that under section 72 of the Ninth Schedule to the Constitution Act, the Governor-General was not entitled to promulgate an Ordinance bearing upon "preventive detention for reasons connected with the maintenance of public order" because that is exclusively a provincial subject (List II, entry 1). This contention was founded on the concluding words of section 72 which subject the Ordinance-making power "to the like restrictions as the power of the Indian Legislature to make laws". It was urged that, as the Indian Legislature was not normally entitled to legislate on List II subjects, the fact that by reason of a proclamation of emergency under section 102 of the Constitution Act the powers of the Indian Legislature had for the time being been enlarged so as to embrace provincial subjects as well, would not widen the scope of the Ordinance-making power. We are unable to accept this contention. The positive provision enabling the Governor-General to promulgate Ordinances is not that contained in sections 99 and 100 of the Constitution Act but that contained in the earlier portion of section 72 itself, and the words "for the peace and good government of British India" there found have always been held to be words of the widest amplitude. It is true that in the earlier Government of India Acts this provision was not controlled or restricted by anything like the allocation of certain subjects exclusively to provincial legislatures; but so far as the scope of the expression is concerned, it must in our judgment still continue to have the same wide meaning as before. The latter part of the section no doubt imports a limitation by reference to the powers of the Indian Legislature. So far as that limitation involves a restriction of the wide scope of the earlier words, the extent of the restriction must be ascertained not merely in the light of section 100 but also of section 102 of the Act of 1935. It has not been disputed that the Indian Legislature is to-day competent to legislate both upon central subjects and upon provincial subjects. We see no justification for limiting the Ordinance-making power even in such circumstances to List I and List III subjects. Another possible answer to the contention is that during war conditions even 'maintenance of public order' may reasonably be held to be included in the expression "preventive detention in British India for reasons of state connected with Defence" entry 1 of List I, but it is unnecessary to base our decision on that ground.

It was next urged that the provisions of section 10 of the Ordinance were beyond the Ordinance-making power, because (a) the emergency described in the opening paragraph of the Ordinance did not postulate the necessity for such a provision and (b) an Ordinance could not repeal section 491 of the Criminal Procedure Code as it was suggested section 10 in effect does. We are of the opinion that there is no substance in these contentions either. It is not necessary that an Ordinance should set out in detail the nature of the emergency that

has led to its promulgation, referring therein to all the provisions of the proposed Ordinance. Once the Governor-General is of the opinion that an emergency calling for action under section 72 has arisen, the nature of the provisions required to meet that emergency is left to be decided by the Governor-General. We may, however, point out that in this case, the preamble refers to the necessity "to confirm the validity of the past exercise of such powers under rule 26 of the Defence of India Rules". This recital has relation both to section 10 and to section 6 of the Ordinance.

The argument as to the power of the Ordinance-making authority to repeal a provision of an independent legislative measure does not call for determination in this case, because section 10 does not purport to repeal section 491 of the Criminal Procedure Code. It would be too much to maintain that no Ordinance could contain any provision inconsistent with a provision contained in any Act of the legislature. Section 491 of the Criminal Procedure Code confers a certain power or jurisdiction on the High Court, and all that section 10 of the Ordinance does is to interdict the High Court from exercising that power or jurisdiction in a certain class of cases. It was then said that so viewed the Ordinance interfered with the jurisdiction of the High Court and this was not permissible because of section 223 of the Constitution Act. It was insisted that the Ordinance-making authority could not be regarded as "the appropriate legislature" to whom alone the power to affect the jurisdiction and powers of the High Court has been given by that section. There are two answers to this argument. Section 311 (6) of the Constitution Act provides that any reference in the Act to Federal Acts, etc. . . . shall be construed as including a reference to an Ordinance made by the Governor-General, etc. . . . If this description could include an Ordinance made by the Governor-General under section 72 of Schedule IX, such an Ordinance would also fall within the description "Act of the appropriate legislature" in section 223. Should it however be assumed that section 311 (6) only referred to Ordinances passed under sections 42, 43, 88 and 89 of the Act of 1935, the result would only be that under section 223 the High Court would continue to have the same jurisdiction and powers "as immediately before the commencement of Part III of this Act." At that time, the jurisdiction and powers of the High Courts were expressly subject to the Governor-General's Ordinance-making power under section 72 by reason of a clause to that effect in the Letters Patent.

It was next contended that sections 6 and 10 of Ordinance III were retrospective in their operation and that it was beyond the competence of the Governor-General to enact a retrospective Ordinance. This question is concluded by the decision of this Court in *Sibnath's case*. Whatever may be said as to the provision in clause (1) of section 6 about the 'validity' of the order of detention, so much of that section and of clause (1) of section 10 as enacts that the order of detention shall not be called in question in any Court is valid according to that decision.

Clause (2) of section 10 of the Ordinance was objected to on a different ground. It was said that this was an arrogation of judicial power by a legislating authority. It was argued that a legislating authority might be competent to enact a law even in such manner as to prejudice the rights of parties to a pending litigation, and a Court might be obliged to dismiss a proceeding as a result of the application of the law as changed. But, goes the argument, all that the legislating authority does in such a case is only to pass a law; and the disposal of the particular case still remains the function of the Court. In the present case, however, clause (2) of section 10 does not enact a rule of law and leave it to the Court to apply it to the decision of cases pending before it; the section straightaway discharges all pending proceedings. This objection was sought to be met, on behalf of the Crown, in two ways. The Advocate-General

of India argued that—whatever may be said of the language employed—clause (2) did not go and was not intended to go further than what clause (1) provided. If that were so, the scope and effect of clause (2) must depend upon the construction that we place on clause (1). The Advocate-General of Bihar maintained that clause (2) was valid and within the competence of the Ordinance-making authority to the full extent which its language signified, even if it went further than clause (1) of that section. With this argument we are unable to agree.

The distinction between a 'legislative' act and a 'judicial' act is well known, though in particular instances it might not be easy to say whether an act should be held to fall in one category or in the other. The legislature is only authorised to enact laws. Some of the pending proceedings hit at by clause (2) of section 10 may raise questions of fact and their determination may wholly depend upon questions of fact and not upon any rule of law, as for instance, when it is alleged that an order of detention was not really the act of the authority by whom it purports to have been made or that it was a *mala fide* order or one made by a person who had not been authorised to make it. A direction that such a proceeding is discharged is clearly a judicial act and not the enactment of a law. This question was discussed at some length in the judgment of this Court in *Piare Dusadh and others v. King-Emperor*¹. The nature of the provision then considered was essentially different from clause (2) of section 10 of the present Ordinance. As explained in that judgment, the position there was that certain cases had in fact been tried by Tribunals constituted under an earlier Ordinance and decisions had been pronounced by those Tribunals, but the jurisdiction of those Tribunals was negatived by a decision of this Court. The later Ordinance provided that those decisions should be treated as decisions of duly constituted Tribunals. Applying the test laid down in *Federal Commissioner of Taxation v. Munro*² this Court held that that did not constitute an exercise of judicial power by the Ordinance-making authority. But here there has been no investigation or decision by any Tribunal which the legislating authority can be deemed to have given effect to. It is a direct disposal of cases by the legislature itself.

The learned Judges of the Patna High Court overruled this objection on the authority of a decision of the Supreme Court of the United States (*Calder v. Bull*³). We were informed by counsel that the report of the case was not available at Patna and they thought that the learned Judges probably relied on the reference made to it in *Phillips v. Eyre*⁴. That perhaps explains how the learned Judges happened to treat that decision as an authority against the appellants' contention; it is, if anything, an authority in their favour. The Supreme Court was there called upon to consider the validity of a "resolution" passed by the Legislature of Connecticut in 1795, whereby a decree of a Court of Probate was set aside and a new hearing was directed. The Court recognised that this was a judicial act and not a legislative act; but nevertheless they upheld the resolution because according to the then Constitution of Connecticut, the body which passed that resolution had judicial powers also and was competent to grant a new trial. The learned Judges added that they dealt with the question of the validity of *ex post facto* "legislation" only because counsel for the appellant thought it would be advantageous to his client to ask the Court to deal with the case on the footing that the resolution was a legislative act; they held against him even on that assumption. This decision has been referred to in *Phillips v. Eyre*⁴ only in connection with the doctrine of *ex post facto* legislation and not in any discussion of the difference between a judicial act and a legislative act.

The Order-in-Council considered by the Judicial Committee in *Abeyesekera v. Jayatilaka*⁵ contained a provision in the following terms:—

1. (1944) 1 M.L.J. 305; (1944) F.C. R. 61; 6 F.L.J. 187 (F.C.).

2. (1926) 38 Com.L.R. 153.

3. 3 Dallas 386.

4. (1870) 6 O.B. 1.

5. (1932) A.C. 260.

"if any such action or legal proceeding has been or shall be instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make."

It will be noticed that this left it to the Court to dismiss the proceeding and left intact the power of the Court to make orders as to costs. The direction to dismiss must be understood in the light of an earlier provision in the same Order-in-Council which amended the law on which the proceeding was founded; the dismissal was thus the result of the change in the law and all that the later clause showed was that that change was to have retrospective effect and govern the rights of parties even in pending proceedings. The decision would be helpful to the Crown here only if and in so far as the provision in clause (2) had followed from a change in any rule of law. It must also be remembered that the Judicial Committee was not dealing with an act of a non-sovereign authority. The order had been enacted by His Majesty-in-Council and the Committee, after a discussion of the constitutional position in Ceylon, held that it was made "by virtue of the legislative authority he had reserved to himself" as sovereign, when passing the very Order on which the plaintiffs' proceeding was founded.

The Advocate-General of India brought to our notice a section in the Indemnity Act, 1919 (Act XXVII of 1919), passed by the Indian Legislature, which winds up with the words 'and if any such proceeding has been instituted before the passing of this Act, it is hereby discharged.' Two observations have to be made in relation to this enactment. For one thing, this concluding provision seems only to follow as the result of the indemnity enacted by the preceding clause. It is thus consistent with the position now contended for by the Advocate-General of India; but it will not afford any support to the contention of the Advocate-General of Bihar. In any event, this provision has not been judicially discussed and the mere fact of such a provision having been enacted in that form once before will not give it a validity which it will not otherwise possess. We think it right to add that clause (2) of section 10 of the present Ordinance bears no analogy to enactments indemnifying public officers. Its effect is to continue the deprivation of a subject's liberty and at the same time to deny him the opportunity of showing that his detention is not warranted by any statute or statutory rule. We are of the opinion that the appeals before us must be dealt with on the footing either that clause (2) of section 10 of the Ordinance has no wider operation than clause (1), or that clause 2 is void and inoperative. Our decision must accordingly turn on the construction and effect of clause (1) of section 10.

Turning now to the question of the interpretation of the relevant provisions of the Ordinance, the first point for determination is: what are the orders included in the expression 'every such order' in clause (2) of section 6. The operation of clause (1) of section 10, in so far as it relates to the orders classified as category (b) above, will be limited to the orders falling under clause (2) of section 6. The same will govern even clause (2) of section 10, if that provision is to be given effect to. On behalf of the detenus, it has been contended that the word 'such' attracts not merely the qualification to be found in the opening words of clause (1) of section 6, namely, 'order made before the commencement of this Ordinance under rule 26 of the Defence of India Rules' but a further qualification to be extracted from the reference there contained to the ground of invalidity arising out of the *ultra vires* character of rule 26. On this footing, it was argued that all that section 10 debars is objection or relief based merely on the ground that rule 26 of the Defence of India Rules was *ultra vires* and that the power of the Court to grant relief on other grounds has not been taken away. The Patna High Court (in the judgment under appeal)* and the Calcutta High Court (in *Jatindra Gupta and others v. King Emperor*)¹ have

1. Misc. Case No. 236/43 on High Court file.

not been prepared to adopt this limited construction. The contention is referred to in the judgment of the Lahore High Court in *Baldev Mitter v. King Emperor*¹ but it was apparently not found necessary in that case to decide the point. It was suggested on behalf of the appellants that the judgment of the Full Bench of the Bombay High Court (in Criminal Application No. 585 of 1943) supports them. A careful perusal of the judgment does not convince us that so far as clause (2) of section 6 is concerned, the learned Judges have adopted the construction now contended for by the appellants. In one place they observe 'that it is only orders made valid by section 6 (1) to which section 6 (2) applies and is limited'. This language may in fact cover *all* orders passed before the commencement of this Ordinance because they had all been passed under rule 26 of the Defence of India Rules and they were all tainted with the illegality attaching to that rule, at any rate all the orders passed before Ordinance XIV of 1943. In another part of the judgment, they say 'only orders valid except for the defect mentioned in sub-section (1) were covered by sub-section (2)'. This is different from saying that sub-section (2) is limited to orders which are liable to challenge *only* on the ground of the invalidity of r. 26. The learned Judges were emphasising the difference between orders which substantially complied with rule 26 and orders which *only purported* to be made under rule 26 but did not in substance comply with its requirements. We shall return to this question when we consider the effect of section 10.

So far as section 6 (2) is concerned, we are of the opinion that the limited construction put forward on behalf of the appellants is not its proper or natural meaning. To begin with, that construction is not in accordance with the ordinary connotation of the word 'such'. The word ordinarily attracts only whatever is expressed as qualifying or *descriptive* of the same subject in the preceding sentence. So viewed, it can only refer to the words "made before the commencement of this Ordinance under rule 26 of the Defence of India Rules", because they alone qualify or are descriptive of the order dealt with in clause (1) of section 6. The succeeding words in clause (1) are enacting words and not descriptive words. They refer to a possible ground of invalidity and enact that such ground of invalidity shall not furnish a basis for relief. We are unable to hold that as a matter of grammatical construction those words can be imported into clause (2). Further, it seems to us that the construction contended for will not be consistent with the scheme of the Ordinance. As explained already, the Ordinance was promulgated with a view to get over difficulties arising out of the statutory rules on which the power of detention had depended. The authorities preferred to base it on an independent enactment and accordingly promulgated the Ordinance. Normally, only orders passed subsequent to the promulgation of the Ordinance could be supported by the new power. To avoid a situation under which existing orders would be subject to the old Act and rules and only new orders subject to the new Ordinance, it was thought necessary to enact that even orders that had been passed under the old statutory rules should be deemed to have been and should have effect as if they had been made under the Ordinance. This explains the dichotomy assumed in section 10, namely, of orders made under the Ordinance and orders having effect as if they had been made under the Ordinance. It is scarcely consistent with this scheme to assume that clause (2) of section 6 comprised only *some* of the orders that had been passed under rule 26 of the Defence of India Rules and that other orders passed under that rule were left to stand in a category of their own and continue to be governed by the old rules themselves. It was also a further part of the scheme of the Ordinance that after its date, orders of detention should ordinarily be in force only for six months unless continued on further consideration for another period. Section 9 which gives effect to this intention adopts

1. [1944] F.L.J. 149.

the same dichotomy as section 10, classifying the orders into (i) orders made under this Ordinance and (ii) orders deemed under the provisions of section 6 to have been so made. If some of the orders made under rule 26 of the Defence of India Rules should be held not to be comprised in clause (2) of section 6, the persons detained under those orders would not be entitled to the benefit of section 9, a result which does not seem to be consistent with the scheme and purpose of the Ordinance. Lastly if clause (1) of section 10, in so far as it relates to orders passed before the date of the Ordinance, were to be limited to orders open to objection only on the ground of the invalidity of rule 26 of the Defence of India Rules, the provision would seem to be redundant because that matter has been specifically provided for in clause (1) of section 6. *Per contra*, it has been suggested that if clauses (1) and (2) of section 10 were applicable to all orders of detention on whatever ground they might be impeached, clause (1) of section 6 would have been unnecessary because the objection to the validity of rule 26 would also be one of the objections precluded by section 10. It is difficult to deny the force of this contention. It is however possible that as the corresponding provision in Ordinance XIV of 1943 had already been the subject of a decision of this Court, the authorities deemed it safer to reproduce it as clause (1) of section 6 of the new Ordinance in addition to the general language of section 10 which had still to run the gauntlet of a challenge in a court of law. Clause (1) of section 6 also goes somewhat further than section 10 in that it not merely affects the remedy but also enacts that the orders there referred to shall not be deemed to be invalid. A declaration to that effect was apparently not thought right to make except in a limited class of cases.

The view stated above as to the scope of clause (2) of section 6 will also determine the ambit of the expression 'order having effect by virtue of section 6, etc.' in section 10 of the Ordinance. But it does not follow from this that the Court can no longer consider the validity of an order which on the face of it appears or purports to have been passed under rule 26. It is on this aspect of the case that the judgment of the Bombay Full-Bench is of assistance. We respectfully agree with the learned Judges that the Ordinance does not protect a document which is not really an 'order under rule 26' though it may appear on its face to be the order of an authorised officer. Clauses (1) and (3) of section 10 of the Ordinance have not introduced any new principle of immunity. Except for the reference to section 491 of the Criminal Procedure Code, they only re-enact clauses (1) and (2) of section 16 of the Defence of India Act, and they had to be so re-enacted because all future orders of detention would be made under the Ordinance itself and could not therefore attract the benefit of section 16 of the Defence of India Act. The verbal change effected by the omission of the words 'and signed' found in section 16 (2) of the Act is explained by the inappropriateness of that requirement in the case of orders purporting to be passed by a 'Governor' because under section 59 of the Constitution Act such an order is not 'signed' by the Governor. It is material to note that while clause (3) of section 10 of the Ordinance enacts a presumption in favour of any order purporting to have been made by any authority, etc., clause (1) of section 10 and clause (1) of section 6 which is imported into clause (2) of section 6 refer only to an order made and do not include orders 'purporting to be made'. The same distinction was made in clauses (1) and (2) of section 16 of the Defence of India Act (XXXV of 1939). The circumstance that even in the new Ordinance the presumption is laid down in clause (3) of section 10 only as a rebuttable presumption is significant. Such a presumption can be rebutted; but it would be meaningless to allow it to be rebutted if, by reason of clause (1) of the same section, the party is not to get any relief even after rebutting the presumption. The addition in clause (1) of section 10 of the words which preclude the exercise of the power under section 491 of the Criminal Procedure Code involves no change in the legal position. That part of the clause is only

consequential upon and must be held to be co-extensive in operation with the preceding part of the clause. Its scope is also limited by the repetition of the words 'any order having effect under this Ordinance'.

In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance III of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under rule 26 and now deemed to be made under Ordinance III or a new order purporting to be made under Ordinance III was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that rule 26 was *ultra vires*, section 10 of Ordinance III will no more prevent it from so finding than section 16 of the Defence of India Act did. Such an invalid order, though purporting to be an order, will not in fact be an "order made under this Ordinance" or having effect by virtue of section 6 as if made under this Ordinance at all for the purposes of section 10.

We are accordingly of the opinion that the learned Judges who pronounced the main judgment (in Criminal Miscellaneous Cases 60/43 and 204/43) erred in holding that the new Ordinance has taken away the power of the High Court to pass any orders under section 491 of the Criminal Procedure Code and that the proceedings must be treated as discharged under the provisions of section 10 (2) of the Ordinance. The judgments in the other two cases purport to follow this judgment. There are observations in some of the judgments bearing upon what may be called the merits of the case. But it is difficult to say that the treatment of that aspect of the case is not likely to have been affected by the view which the learned judges took as to the deprivation by the Ordinance of the power of the Court to pass any order under section 491 of the Criminal Procedure Code. It seems to us that in these circumstances the only proper course is to allow all the four appeals and to set aside the orders of dismissal passed by the High Court in all these cases. The cases will be remitted to the High Court with a direction that the petitions be restored to the file and disposed of in due course of law, in the light of the decision above given as to the nature and extent of the Court's power in the matter.

V.S.

Appeals allowed and cases remitted.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Angappa Mudaliar and another

Petitioners.*

Opium Act (I of 1878), section 9 (b)—Licensee employing "debarred" person to transport opium from one shop to another—Punishment for breach of condition in license prohibiting such employment.

A condition in a license for the sale of opium stated that "no person who has been debarred by the Collector from bidding at the sales of abkari or opium shops shall be employed in any capacity in connection with the management or the working of shops or depots licensed for the sale of liquor, opium or intoxicating drugs."

Where the licensee employed a "debarred" person to carry opium from one shop to another with a transport license issued in the name of the licensee,

Held, that the breach of the conditions in a license is punishable only by cancellation or suspension of the license and as there is no provision in the Opium Act for the prosecution of offenders who commit breaches of the conditions the licensee cannot be convicted for an offence punishable under section 9 (b) of the Opium Act.

The servant however can be convicted for transporting the drug without a valid license.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate of Erode dated 31st December, 1943, and passed in C. C. No. 281 of 1943.

* Cr. R. C. No. 278 of 1944.

(Cr. R. P. No. 264 of 1944).

C. K. Venkatanarasimham for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—On the night of 25th July, 1943, the first petitioner was found in possession of half a cake of opium which he was carrying on behalf of the second petitioner to the latter's opium shop at Barghur; and when asked to account for his possession, he produced a transport license issued in the name of the second petitioner, who is a licensed vendor. The first petitioner is a debarred person within the meaning of condition 14 in the vendor's license. Both the petitioners were convicted for offences punishable under section 9 (b) of the Opium Act, the first petitioner for transporting the drug without a valid license, and the second petitioner for employing a debarred person contrary to condition 14 of his license.

So far as the first petitioner is concerned, it is stated in the conditions governing the sale of opium that "no person who has been debarred by the Collector from bidding at the sales of abkari or opium shops shall be employed in any capacity in connection with the management or the working of shops or depots, licensed for the sale of liquor, opium or intoxicating drugs." These words are sufficiently wide to cover the transport of opium from one shop to another in accordance with the rules; and as the permit which the first petitioner had in his possession was not issued in his name, his conviction under section 9 (b) cannot be assailed.

Regarding the second petitioner the learned Public Prosecutor has pointed out that there is a lacuna in the Act as it makes no provision for the prosecution of offenders who commit breaches of the conditions of their licenses. Rules have been framed by the Local Government under section 5 of the Opium Act, and rule 21 gives the Collector power to cancel or suspend any license or permit for a breach of the conditions or on conviction for an offence under the Act; but there is nothing in the Act corresponding to section 36 of the Madras Abkari Act under which a breach of the conditions is punishable under the Act. It is clear that the second petitioner committed a breach of condition 14 of his license by employing the first petitioner as a servant to carry the opium from one shop to another; but as the rules stand, this is punishable only by cancellation or suspension of the license under rule XI (b) or XXI of the rules.

In the result the conviction and sentence of the first petitioner are confirmed, and the conviction of the second petitioner is set aside and the fine, if paid, ordered to be refunded.

K.S.

Conviction of second petitioner set aside and that of first petitioner confirmed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Purushothama Nair

.. *Appellant**

v.

Raya Pandaram

.. *Respondent.*

Mortgage decree—Appeal by alienee of hypotheca impleaded as defendant—Personal decree for costs against such alienee—Power of Court to pass—Civil Procedure Code (V of 1908), Order 34, Rule 13—Not applicable.

In a mortgage suit, the Court has power to pass a personal decree for costs against the defendants who were not parties to the mortgage. Where the appellate Court in dismissing an appeal by the alienee of a portion of the mortgaged property and allowing the memorandum of cross-objections, expressly made the appealing alienee personally liable for the costs in the appellate Court and there was no order for costs against the other defendants, the order for costs can be executed against the alienee personally. The principle embodied in rule 13 of Order 34 of the Civil Procedure Code is not applicable and it cannot be claimed that the sale proceeds of the mortgaged properties should first be appropriated to the costs. The fact that the mortgagors did not object to the inclusion of the costs of the appeal in the sum for which execution was asked for against the mortgaged properties cannot affect the rights of the decree-holder to proceed against the alienee appellant subsequently.

Sabapathi Pillai v. Chockalinga Pillai, (1913) 25 M.L.J. 552, distinguished.

Rajagopalaswami Naicker v. Palaniswami Chettiar, (1931) 62 M.L.J. 93 : I.L.R. 55 Mad. 332, applied.

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 23rd February, 1943, in E. A. No. 908 of 1942 in O. S. No. 211 of 1935.

C. K. Viswanatha Aiyar for Appellant.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—On the 23rd October, 1936, the Subordinate Judge of Coimbatore passed a preliminary mortgage decree against eight defendants for the payment of the sum of Rs. 1,900 with interest and costs, which brought the total amount to Rs. 4,396-4-6. The mortgagors were the first and second defendants. The other defendants were alienees of portions of the properties mortgaged. The third defendant, who is the appellant in this appeal, appealed to the High Court against the preliminary decree. The mortgagee filed a memorandum of cross-objections. The result was that the appeal was dismissed and the memorandum of cross-objections was allowed. This Court held that the mortgagee was entitled to a total sum of Rs. 8,120-14-8. As the third defendant had lost both on the appeal and on the memorandum of cross-objections; this Court directed that he should pay as the costs on the appeal Rs. 273-8-7 and as costs on the memorandum of cross-objections Rs. 399-15-0. In due course, the Subordinate Judge passed a final decree in accordance with the High Court's judgment, and on the 6th February, 1941, the decree-holder applied for the sale of the hypotheca. There was then due to him Rs. 10,075-4-8 excluding the costs which the third defendant had been directed to pay by the appellate decree. The sale realised only Rs. 8,265 and as the personal remedy against the mortgagors had become time-barred, the decree-holder was not able to apply for a personal decree against them. On the 27th March, 1942, he filed an application in the Court of the Subordinate Judge for execution of that part of the High Court's decree which directed the third defendant to pay costs. The application was returned to the decree-holder on the ground that the sale proceeds had to be appropriated first to the costs due to the decree-holder and therefore he was not entitled to ask for the execution of the decree for costs. On the 13th July, 1942, the decree-holder filed another application for execution of the decree for costs and asked that the delay in presenting this petition might be excused. On the 6th August, 1942, the Subordinate Judge rejected this application. On the 15th of that month the decree-holder applied to the Subordinate Judge for an order directing the High Court's decree for costs to be transferred to the Court of the Subordinate Judge of Palghat for the purpose of execution. On the 23rd February, 1943, this application was granted. The present appeal has been preferred by the third defendant against this order.

The appellant relies on the decision of this Court in *Sabapathi Pillai v. Chockalinga Pillai*¹. There a Bench, consisting of Benson and Sundara Ayyar, JJ., held that the principles embodied in Order 34, rule 13, should be applied to sales held in execution of mortgage decrees. It was, of course, recognised that the rule only applied to cases covered by rule 12, but the learned Judges considered that the principles embodied in rule 13 should be followed in all sales held in execution of mortgage decrees. On this footing the Court directed that the sale proceeds should first be appropriated to interest and the costs of the suit, and then to principal.

It is not necessary for us to consider whether the judgment in that case is open to criticism, as it has no application here. In that case the Court was considering merely the decree passed by the trial Court and there was no direction that a non-mortgagor defendant should be made personally liable for costs.

A case which is in point in *Rajagopalaswami Naicker v. Palaniswami Chettiar*² This was also decided by a Bench (Jackson and Pakenham Walsh, JJ.) It was

1. (1913) 25 M.L.J. 552.

2. (1931) 62 M.L.J. 93: I.L.R. 55 Mad. 332.

there held that in a mortgage suit, the Court has power to pass a personal decree for costs against defendants who were not parties to the mortgage, notwithstanding that the preliminary mortgage decree is silent on the point. The defendants were the mortgagor and his three sons who were impleaded as the second, third and fourth defendants. The trial Court in passing a mortgage decree directed that after the hypotheca had been sold the plaintiff might apply for a personal decree against the mortgagor for the balance still due under the mortgage and costs and against the second and third defendants for the amount due for costs. As the decree had directed that the second and third defendants should be personally liable for costs, the decree-holder was entitled to proceed against them in execution.

That is what the decree-holder seeks to do in this case. The decree of this Court passed on the appeal against the preliminary mortgage decree expressly made the third defendant liable for the costs incurred in this Court. No order as to costs was passed against the other defendants. In the circumstances mentioned the mortgagor-defendants could no doubt have objected to the costs in the appeal being included in the sum for which execution was asked for on the 6th February, 1941, but the fact that they raised no objection cannot affect the rights of the decree-holder to proceed against the third defendant. Costs are in the discretion of the Court and the Court can lawfully direct who shall be liable for costs. In this case the only person who could be made liable for costs was the third defendant. He was the sole appellant and he was the only defendant who opposed the memorandum of cross-objections filed by the decree-holder. If the contention advanced on behalf of the third defendant were to be accepted, it would mean that a person in his position could file an appeal to the Privy Council, without incurring any liability for the payment of costs there.

We consider that *Rajagopalaswami Naicker v. Palaniswami Chettiar*,¹ was rightly decided and that the principle embodied in that judgment applies in the present case.

The appeal will be dismissed with costs.

K.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Alamelu Ammal

*Petitioner**

v.

P. Rangai Goundar

Respondent.

Promissory note—Suit on—Note reciting that amount will be paid within 2 years—Not a note payable on demand—Article 49, Stamp Act (II of 1899)—Duty payable as on a bond—Section 35, if applicable.

The definition of promissory note in the Stamp Act is much wider than in the Negotiable Instruments Act. The second part of Article 49 of the Stamp Act includes not only those instruments which are promissory notes only under the Stamp Act but also those documents which are promissory notes under the Negotiable Instruments Act but which are not payable on demand.

Where a promissory note stamped with two one anna stamps, which would be correct if the note were one payable on demand, contained the clause : "I shall pay to you or to your order within two years the said sum"

Held, that the promissory note fell within the scope of Article 49 (b) of the Stamp Act and that the duty payable on it would be the same as on a bond.

Held further, that section 35, proviso (a) does apply, for although the duty payable on the suit note was the same as that on a bond, the document was in fact a promissory note and as such was not exempted under the section.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff (Principal) of Coimbatore dated 13th September, 1943, and passed in S. C. S. No. 473 of 1943.

T. V. Ramanatha Aiyar for Petitioner.

S. Ramachandra Aiyar for Respondent.

The Court delivered the following

1. (1931) 62 M.L.J. 93 : I.L.R. 55 Mad, 332.

* C. R. P. No. 1866 of 1943.

7th August, 1944.

JUDGMENT.—The petitioner's suit on a promissory note dated the 26th June, 1940, was dismissed because the document was not properly stamped.

The promissory note was stamped with two anna stamps, which would be correct if the promissory note were one payable on demand. The relevant clause of the document runs thus : " I shall pay to you or to your order within two years the said sum " This must mean that the promisor is allowed two years within which to pay the money and within which the promisee cannot enforce the debt. Mr. Ramanatha Ayyar argues that as the wording is " within two years " and not " after two years," it must mean that the plaintiff is entitled to demand the money at any time within two years and that the document is therefore really a promissory note payable on demand. If the debt could be demanded at any time within two years, then the words " within two years " would have no meaning at all. It seems clear to me that these words were introduced to give the debtor time within which to pay the debt and that within that time the promisee could not enforce the debt. It follows that the promissory note is not one payable on demand.

The definition of promissory note in the Stamp Act is much wider than in the Negotiable Instruments Act. According to Article 49 of the Stamp Act, which deals with the duty payable on promissory notes, a sum of one anna, two annas, or four annas should be affixed to a promissory note payable on demand. The second part of that Article refers to all other promissory notes and therefore includes not only those instruments which are promissory notes only under the Stamp Act but also those documents which are promissory notes under the Negotiable Instruments Act but which are not payable on demand. A promissory note like the suit promissory note, which is payable after two years, would therefore come within the scope of Article 49 (b) ; and the duty payable on such an instrument would be the same as on a bond, because it is payable more than one year after the execution of the note.

Mr. Ramanatha Ayyar's third and last argument is that since the debt payable is that on a bond the note must be treated as a bond and that it would not therefore be hit by proviso (a) to section 35 of the Stamp Act. That section in general permits documents that are not properly stamped being admitted in evidence provided the penalty is paid, with the exception of promissory notes and some other documents. This argument cannot be accepted ; for although the duty payable on the suit note is the same as that on a bond, the document is in fact a promissory note.

The petition is dismissed with costs.

V.P.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Gogineni Bapayya

*Appellant**

v.

Gogineni Ramakrishnayya and others

Respondents.

Practice—Appeal—Suit for partition—Dismissal—Successful defendant—Not entitled to appeal.

In a suit by a person against his four brothers for a partition of movable property belonging to their joint family alleging that a partition of the immovable properties had already taken place and all that remained to be done was to divide the movables, the first defendant's plea that the suit was bad because the plaintiff did not ask for full partition was upheld and the suit was dismissed. Though the plaintiff did not question the correctness of the decision, the first defendant who was dissatisfied with some of the statements in the judgment with regard to the movables filed an appeal.

Held, that the first defendant having asked the Court to dismiss the plaintiff's suit must accept the dismissal and has no right to appeal against it.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Ayyar, J., dated 23rd July, 1943, M. S. A. No. 1017 of 1942

preferred against the decree of the Court of the Subordinate Judge Tenali, in A. S. No. 62 of 1939 (O. S. No. 29 of 1932, District Munsiff Court, Repalle).

P. Satyanarayana Rao for Appellant.

*A. Lakshmayya** and *D. V. Reddi Pantulu* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant filed his suit in the Court of the District Munsiff of Repalle for a partition of movable property belonging to the joint family of which he was a member. The defendants were his four brothers. The plaintiff alleged that a partition of the immovable properties had already taken place and all that remained to be done was to divide the movables. The suit was resisted by the first defendant, who was supported by the third defendant. The second defendant supported the plaintiff. The fourth defendant allowed the suit to proceed *ex parte*. The first defendant pleaded that the suit was bad because the plaintiff did not ask for full partition. According to the first defendant, all the immovable properties had not all been divided and the plaintiff was only seeking partition of some of the movable properties. The District Munsiff held that there had been a complete partition with regard to the immovable properties, and then proceeded to take the evidence with regard to the movable properties. At the end of the case he came to the conclusion that the first defendant's plea that the plaintiff was only seeking partial partition of the movables was well founded. Consequently he dismissed the suit with costs.

Although he was not aggrieved by the dismissal of the suit which he had in fact pressed for, the first defendant filed an appeal in the Court of the Subordinate Judge of Tenali. He did so because he was dissatisfied with some of the statements in the District Munsiff's judgment with regard to the movables. The plaintiff himself did not question the correctness of the District Munsiff's decision that the suit failed because only partial partition of the movables was asked for. The Subordinate Judge dismissed the appeal. The first defendant then appealed to this Court. The second appeal was heard by Chandrasekhara Ayyar, J., who set aside the decree of the Subordinate Judge and remanded the case to the Subordinate Judge for a decision on the merits. The present appeal is from the judgment of Chandrasekhara Ayyar, J.

The learned Judge considered that this case fell within the line of cases of which *Krishnachandra Goldar v. Moheshchandra Saha*¹, is an example. The principle established by these decisions is that a defendant has the right to appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree. We find ourselves unable to agree that they have application. In the first place, the trial Court accepted the plea of the first defendant that the suit was not maintainable. He expressly asked for its dismissal and secured its dismissal with an order for costs in his favour. A party cannot be allowed to blow hot and cold, and the first defendant, having asked the Court to dismiss the plaintiff's suit, must accept the dismissal. Moreover, there is nothing in the decree which affects the first defendant adversely. No finding in the judgment of the District Munsiff can operate as *res judicata*. The rights of the parties were left entirely untouched by the dismissal of the suit. It may be that the first defendant considers that if he filed a suit for partition he might find the law of limitation operating adversely to him. This cannot, however, be regarded as a factor in the case. The first defendant could have brought his own suit for partition if he had so desired.

The appeal will be allowed with costs against the first respondent here and in the second appeal. The orders of the District Munsiff and the Subordinate Judge on the question of costs will stand.

K.S.

Appeal allowed.

1. (1905) 9 C.W.N. 584.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

S. R. Raja Rao and another

∴ *Petitioners**.

Defence of India Rules (1939), rule 81 (4)—Food Grains Control Order (1942), clauses 3 and 7-A—Purchase of paddy as buying agent of another without a licence—No payment of commission or salary—Remuneration to come out of the actual purchasing price and that allowed by the purchaser—Purchase an offence punishable under clause 3—Clause 7-A—Scope of order of forfeiture under—Cannot extend to entire quantity seized but only to the quantity forming subject-matter of the charge.

Before the Food Grains Control Order came into force the accused were acting as the buying agents of food grains for a company which was the managing agent of several tea estates. After the control order came into force the accused applied for a licence to trade in food grains but the application was rejected. Subsequent to this the company appointed the accused as their buying agents for purchasing certain food grains at certain rates and authorised them to make purchases on their behalf. There was no reference to any commission or salary to be paid. Though each of the tea estates had a licence to purchase food grains, the company as such had no such licence. The accused acting on their authority bought on behalf of the company two lots of paddy from different individuals on different dates. They were charged with having made these purchases without possessing a licence under clause 3 of the Control Order and they were convicted. All the 837 bags of paddy which were seized from the accused were directed to be confiscated though the charge related only to 140 bags. It was contended in revision that the prosecution evidence was not sufficient to sustain the conviction and sentence and that the order for confiscation was bad in law to the extent of the difference between the number of bags seized and those comprised in the charges.

Held, that, (1) although the High Court in the exercise of revisional powers could set aside a conviction and sentence, it would not do so unless the record showed that the evidence is not capable of sustaining the conviction and sentence. In the circumstances of the case, as the accused were not purchasing as servants of the company and looked for their remuneration from the difference between the price at which they bought and the price allowed by the company they were rightly convicted.

(2) Under clause 7-A of the Control Order the forfeiture could only extend to the food grains referred to in the charge, because it was in respect of those food grains that the offence had been committed. As the accused were only charged with offences in respect of 140 bags of paddy and convicted thereon, the order of confiscation was right only to that extent and was wrong as regards the balance of the 837 bags actually seized from the accused.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Coimbatore Division in C. A. No. 117 of 1943, preferred against the Judgment of the Court of the Additional First Class Magistrate, Erode, in C. C. No. 109 of 1943.

K. S. Jayarama Ayyar for N. Sivaswami and V. T. Rangaswami Aiyangar for Petitioners.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Judgment of the Court was delivered by

The Chief Justice.—These two revision petitions arise out of the same case. The petitioners were charged in the Court of the Additional First Class Magistrate, Erode, with an offence punishable under rule 81 (4) of the Defence of India Rules, read with section 34 of the Indian Penal Code and clause 3 of the Food Grains Control Order, 1942. There were two counts. On the first Count each of the accused was charged with having purchased on the 17th February, 1943, at Pudupalayam ten pothis of paddy at Rs. 41 per pothi without possessing a licence under the Food Grains Control Order. On the second count they were charged with having purchased on the 26th February, 1943, at Kondayampalayam 25 pothis of paddy at Rs. 43 per pothi without a licence. One pothi equals four bags. Each bag weighs about one and a half maunds. Clause 3 (1) of the Food Grains Control Order says that no person shall engage in an undertaking which involves the purchase, sale, or storage for sale, in wholesale quantities of any food grain, except under and in accordance with a licence issued in that behalf by the Provincial Government or by an officer authorised by the Provincial Government in this behalf. Clause 2 (c) defines the expression "purchase in wholesale quantities." It means purchase in

* Cr. R. C. Nos. 49 and 50 of 1944.
(Cr. R. P. Nos. 47 and 48 of 1944.)

- quantities exceeding 20 maunds in any one transaction, and includes purchase by a person on behalf of another as a commission agent or as an *arhatiya*.

The petitioner in Criminal Revision Case No. 49 of 1944 is the first accused and the petitioner in Crl. Rev. Case No. 50 of 1944 is the second accused. The accused carried on business in partnership. It is common ground that the first accused is a grain merchant and the second accused is a medical practitioner who has provided the finance for the carrying on of the business of the partnership. On the 5th July, 1942, they applied for a licence to permit them to deal in food grains. By an order dated the 22nd November, 1942, their application was rejected; but they were permitted to dispose of the stock which they had on hand. This they admittedly did before the 17th February, 1943.

Tea Estates India, Limited, is a limited liability company with its office at Coimbatore. The company is the managing agent of fifteen tea estates scattered over the Coimbatore District, the Nilgiris and Malabar. Before the Food Grains Control Order came into force in this Presidency on the 26th June, 1942, the accused were acting as the buying agents of food grains for the estates managed by the Tea Estates India, Limited. On the 24th January, 1943, the first accused wrote to the Tea Estates India, Limited, a letter in which he stated that for the purpose of buying rice as a buying agent for the estates he would have to take out a licence and pay the prescribed fee. It is obvious that he knew of the requirements of the Food Grains Control Order. The refusal of the authorities to issue to the accused a licence for the purchase of paddy and rice meant that they could no longer continue to be the buying agents for these estates, which obviously meant a considerable financial loss to them. On the 24th November, 1942, that is, two days after the order of the authorities refusing the accused a licence for the buying of paddy and rice, the Tea Estates India, Limited, wrote this letter to the first accused as the representative of the partnership :

"We hereby appoint you as our buying agent for buying paddy, ragi, jola, etc., on account of our Thiashola, Kavakundah, Terrace, Fousdon Mullai and our other estates against their licences. You can arrange the necessary godowns for storing of the same till proper transport arrangements are made but you should advise us as early as possible of the stocks purchased and the place of storage for our information.

The licence numbers of the estates will be intimated to you at an early date."

It should be mentioned that each of the estates had a licence for the purpose of buying food grains for the feeding of the coolies working on the estate, and while each estate could go into the market and buy what it required in wholesale quantities, it could not employ a person as a commission agent or as an *arhatiya* unless he held a licence himself. On the next day, the Tea Estates India, Limited, wrote to the first accused as follows :

"With reference to your letter dated the 24th instant, you may purchase 1,500 bags of paddy at Rs. 2-8-0 per bag on our account. We will give you despatch instructions after the paddy is converted into rice and ready for delivery.

We enclose herewith a cheque for Rs. 15,000 towards purchase of this paddy and shall be glad if you will acknowledge receipt of the same.

The advance already paid to you for ragi purchase need not be deducted from your bill. You may use this amount for further purchases of ragi and submit your bill for the full amount towards the costs of 341 bags, that is, 183 bags already despatched and 158 bags on hand."

On the 17th February, the accused bought from Kalianna Goundan (fifth witness for the prosecution) ten pothis at Rs. 41 and on the 26th February from Subbayya Goundan (fourth witness for the prosecution) twenty-five pothis at Rs. 43. The case for the prosecution is that in making these purchases they offended against clause 3 of the Food Grains Control Order in that they had held no license permitting the purchases. On the other hand, the accused say that they were not commission agents or *arhatiyas* under clause 2 (c). They were servants of the Tea Estates India, Limited, working for them without remuneration. Their story was not believed by the trial Magistrate, who accepted the evidence tendered by the prosecution. Consequently, he held that they were guilty of the charges and fined each of the accused on each count the sum of Rs. 250. He also directed that the food grains

which the police had seized should be confiscated to His Majesty under clause 7-A of the Foodgrains Control Order, altogether 837 bags of paddy and rice. The accused appealed to the Sessions Judge of Coimbatore, who concurred in the findings of the trial Magistrate. He also accepted as proper the penalties inflicted, including the order for confiscation. The petitioners ask the Court to reverse the convictions and sentences on the ground that the evidence adduced by the prosecution is not sufficient to sustain them. They further say that the order for confiscation was bad in law to the extent of the difference between the 837 bags seized and the 140 bags comprised in the two charges.

Learned counsel for the accused have said that, if the Court does not believe the evidence of Stephen Thompson (the first witness for the defence), the manager of the Coimbatore branch of the Tea Estates India, Limited, that they were to receive nothing for their services as buying agents, the conviction must be upheld. This witness stated that they were not to get any commission or salary because it would be against the provisions of the Foodgrains Control Order. Neither the trial Magistrate nor the Sessions Judge accepted the proposition that the accused intended to work for nothing. It is probable that the company was not to pay anything as commission or as salary, but it is obvious that the accused were to be remunerated. It is idle to suggest that they would undertake the laborious task and run the financial risk of buying large quantities of foodgrains for all these estates without receiving compensation for their services. The evidence adduced by the prosecution shows that the accused looked for their remuneration from the difference between the price at which they bought and the price allowed by the company.

As we have indicated, on the 25th January, 1943, the Tea Estates India, Limited, instructed the accused to buy 1,500 bags of paddy at Rs. 12-8-0 per bag which means at the rate of Rs. 50 per pothi. They bought 10 pothis from Kalianna Goundan at Rs. 41 per pothi, but got a receipt made out at the rate of Rs. 43 per pothi. Subbayya Goundan granted a receipt for 25 pothis, but no price was inserted therein. The wording of these receipts is very significant. Each is granted in the name of the first accused who is described as "Servant of the Tea Estates India, Limited." The Courts below held that there is here evidence that the accused were to make their remuneration out of the difference between the price at which they bought and the price which they were to charge the Tea Estates India, Ltd., and we agree that the evidence is capable of this interpretation. Although this Court in the exercise of its revisional powers can set aside a conviction and sentence, it will not do so unless the record shows that the evidence is not capable of sustaining the conviction and sentence. Here there is ample evidence and it has been carefully considered both by the trial Magistrate and the Sessions Judge. We will accept the suggestion that the Tea Estates India, Limited, did not intend to pay anything by way of commission or salary, but we cannot accept the suggestion that the accused were to carry out these very important duties for nothing. It is obvious that the accused were not purchasing as servants of the Tea Estates India, Limited. Even if they were, they would have committed an offence because they were not acting as servants of the respective estates. The company did not hold a licence but each estate did. It has never been suggested that they were servants of the respective estates. We hold that the accused were rightly convicted and that the fines imposed were proper.

The petitioners are on firmer ground when they complain of the confiscation order. Clause 7-A of the Foodgrains Control Order reads as follows :

"If any person contravenes the provisions of clause (3) or clause (6) of this Order then without prejudice to any other punishment to which he may be liable any Court trying the offence may order that any stock of foodgrains, together with the packages and coverings thereof, in respect of which the Court is satisfied that the offence has been committed, shall be forfeited to His Majesty."

It is obvious that the forfeiture can only extend to the foodgrains referred to in the charge, because it is in respect of those foodgrains that the offence has been committed. The accused were only charged with offences in respect of 140 bags of paddy. The offences have been proved and the order for confiscation is obviously right to

that extent. But it is equally apparent that it is wrong in so far as it directs the confiscation of the balance of 837 bags. It appears that all the bags of paddy and rice seized by the police have been sold in order to avoid deterioration. In these circumstances the accused will be entitled to the sale proceeds of the foodgrains seized and sold, except to the extent of the 140 bags of paddy. The order of the Sessions Judge will be varied accordingly.

V.S.

Conviction upheld and order of confiscation varied.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Penumooty Kanakaratnam

*Appellant**

Penumooty Venkataratnam

Respondent.

Registration Act (XVI of 1908), section 77—Suit by widow of testator against order of Registrar refusing to register—Party supporting her impleaded as defendant—Registrar not made a party—Suit unsustainable—Court's finding on merits—Finding on genuineness of will cannot operate as res judicata.

The widow of a testator presented his will for registration. One of the attestors, her husband's divided brother, supported the application and there was no opposition. The Sub-Registrar however rejected her application as he was not satisfied that the will was genuine. The Sub-Registrar's order was confirmed on appeal. Thereupon the widow filed a suit under section 77 of the Registration Act, impleading her husband's brother alone as defendant. The Court held that there existed no cause of action as against the defendant and the Registrar not having been made a party, the suit was not maintainable. The Court, however, proceeded to give a finding that the will was not genuine. On appeal,

Held, that there being no cause of action against the person made defendant, the plaintiff should have been non-suited without the merits of the case being gone into. The decision of the Judge on the question of the genuineness of the will cannot operate as *res judicata* in a subsequently filed suit.

Appeal against the decree of the Court of the Subordinate Judge, Cocanada, in O.S. No. 51 of 1941.

P. Somasundaram for Appellant.

D. Namasaraju for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The facts in this case are very unusual. The plaintiff is the widow of one Virraju, who died on the 27th March, 1941. She alleges that he executed a will on the 25th March, 1941, which was duly attested. One of the attesting witnesses was Penumooty Venkataratnam, a divided brother of the deceased. On the 1st May, 1941, the plaintiff applied to the Sub-Registrar of Cocanada for the registration of the will. There was no opposition to her application. On the other hand, she was supported by Venkataratnam. The order of the Sub-Registrar has not been exhibited, but apparently he was not satisfied that the will was genuine. Consequently he rejected the application for registration. The Sub-Registrar's order was confirmed on appeal by the District Registrar. Here again, the plaintiff was unopposed. The Registrar's order was passed on the 8th August, 1941. On the 1st September, 1941, the plaintiff filed the suit which has given rise to this appeal. It was filed under section 77 of the Indian Registration Act, 1908. She made Venkataratnam the defendant, but did not join the Registrar. Venkataratnam filed a written statement in which he alleged that the alleged will was a forgery; but, before the action came on for hearing, with the consent of the Court, he filed an additional written statement in which he averred that the alleged will could not bind his reversionary right and that no cause of action existed against him. At the hearing the Subordinate Judge accepted this contention and expressly held that the defendant was not

a necessary party. Consequently he went on to hold that, as there was no defendant, the suit could not be maintained. Having arrived at this conclusion the Subordinate Judge should have dismissed the suit. Unfortunately, in spite of the absence of the defendant, he went into the question of the validity of the will and came to the conclusion that it was not a genuine document. It was on this ground that he dismissed the suit.

There can be no suit without a cause of action against some one and the person against whom the cause of action arises must be made a party. Here no cause of action existed against Venkataratnam. On the other hand, as we have already pointed out, he supported the plaintiff before the Sub-Registrar and before the Registrar. The Sub-Registrar rejected the application on his own initiative and his action was concurred in by the Registrar. The Registrar's order was the final order and it is his order which must be regarded as rejecting the plaintiff's application for registration. There was a cause of action by reason of the rejection of the plaintiff's application and in the circumstances she should have made the Registrar the defendant if she wished to proceed with the matter. The fact that registration was refused would not, of course, affect the validity of the will, should it prove to be a genuine document.

In *Wishambhar Pandit v. Prabhaker Bhat*¹, a Bench of the Bombay High Court held that neither the registering officer nor the Government was a necessary party to a suit under section 77 of the Registration Act, 1877, but in that case the registration had been opposed. The Court was of the opinion that the proper defendant was the person who had opposed the registration. We have no doubt that in such circumstances it would be sufficient to join as the defendant the opposing party; but here there is no opposing party. The only opposition comes from the Registrar himself.

As Venkataratnam was not a necessary party the Subordinate Judge should, as the case stood, have non-suited the plaintiff without going into the merits. In going into the merits he erred. The suit should have been dismissed on the ground that it was not maintainable in the circumstances.

This means that the appeal will be dismissed. We wish, however, to make it quite clear that the decision of the Subordinate Judge will not operate as *res judicata* on the question of the genuineness of the will. This question will be left entirely open for decision in proper proceedings, should they be instituted.

The appellant has made Venkataratnam the respondent in this appeal and she must pay his costs.

K. C.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Gade Rosi Reddi and another

.. *Appellants**

v.

Gade Kristna Reddi and others

.. *Respondents.*

Specific performance—Contract to sell—Agreement by several vendors to several vendees—Piecemeal enforcement—Permissibility—Severability of contract—Renewal of promissory note—Debt kept alive—Benefit of Madras Agriculturists' Relief Act (IV of 1938).

One V and his sons, the second and third defendants, executed a promissory note on 9th October, 1933, in favour of the plaintiff and his paternal uncle, the first defendant, in renewal of an earlier note executed by V and the second defendant. The plaintiff who was then a minor represented by his guardian and the first defendant brought a suit on the note in 1936 for recovery of the amount due but pending the suit, the parties entered into a compromise as a result of which the suit was dismissed. The terms of the compromise were embodied in three documents one of which was a contract of sale whereby the second defendant and the third defendant as the guardian of his minor wife the fourth defendant agreed to sell certain lands to the plaintiff and the first defendant. The document recited that possession of the properties was delivered forthwith and provided that

1. (1884) I.L.R. 8 Bom. 269.

* S. As. Nos. 60 and 212 of 1943.

21st April, 1944.

a sale deed should be executed and registered within a month from that date and that in case of default the promisees should be at liberty to recover the amount due under a promissory note executed on the same day. It however appeared that after the second and third defendants had become divided the third defendant had previously conveyed to the fourth defendant a certain extent of land, a portion of which was included in the later agreement of sale. As the second and third defendants did not execute a sale deed as agreed, the plaintiff who had then attained majority filed a suit for specific performance. The third document was an indemnity letter given by the third defendant to the plaintiff and the first defendant undertaking to indemnify them in case his wife should raise disputes regarding the sale of her land after attaining majority and to execute a security bond charging the indemnity on certain immovable properties belonging to him. The trial Court held that the contract was indivisible and as no specific performance could be granted in respect of the fourth defendant's properties included in the contract no decree could be passed even in respect of the second defendant's properties. On appeal by the plaintiff and the first defendant the lower appellate Court took the view that the contract so far as it related to the second defendant's properties was severable and valid and passed a decree for specific performance against the second defendant alone confirming the dismissal of the suit against the fourth defendant. Against the said decision, the plaintiff and the first defendant on the one hand and the second defendant on the other preferred second appeals to the High Court.

Held, that the contract was enforceable in respect of the second defendant's property and the fact that it was unenforceable against the fourth defendant was immaterial.

Held also, that although the contract sought to be enforced was severable as regards the vendors and the properties agreed to be sold, it was joint and indivisible so far as the vendees were concerned and the first defendant was entitled to claim specific performance of the contract by the vendor offering to give him a complete discharge of the debt.

Held further, that the original debt due by the defendants 2 and 3 was kept alive and the claim based on the promissory note executed at the time of the compromise could be given effect to and that consequently the plaintiff and the first defendant were entitled to a decree against the third defendant for his share of the debt due under the promissory note subject to the provisions of Madras Act IV of 1938 as to the scaling down of the debt.

Appeals against the decree of the District Court of Kistna at Chilakalapudi dated 22nd September, 1942, in A. S. No. 259 of 1941, preferred against the decree of the Court of the District Munsiff of Bezvada in O. S. No. 605 of 1939.

K. Kameswara Rao for Appellants in S. A. No. 60 of 1943 and for Respondents in S. A. No. 212 of 1943.

V. Rangachari for Respondent in S. A. No. 60 of 1943 and *V. Rangachari* and *S. Srinivasachari* for Appellant in S. A. No. 212 of 1943.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—These two second appeals arise out of a suit for specific performance. One Venkata Reddi and his sons, the second and third defendants, executed a promissory note on 9th October, 1933, in favour of the plaintiff and his paternal uncle, the first defendant, in renewal of an earlier note of 1930, executed by Venkata Reddi and the second defendant. The plaintiff and the first defendant brought a suit on the note in 1936 for recovery of the amount due, but pending the suit, the parties entered into a compromise as a result of which the suit was allowed to be dismissed. The terms of the compromise were embodied in three documents Exs. A, B and C all executed on the same day, namely, 15th October, 1936. Ex. G is a promissory note executed by the second and third defendants (their father having died by that time) in favour of the plaintiff and the first defendant for Rs. 2,004 being the amount of principal and interest settled as payable under the promissory note dated 9th October, 1933. The said sum was to carry interest at the rate of one rupee per cent. per mensem till the date of payment. Ex. A is a contract of sale whereby the second defendant and the third defendant as the guardian of his minor wife the fourth defendant agreed to sell two acres and 50 cents. of land to the plaintiff and the first defendant for the sum of Rs. 2,004 due to them under Ex. G. The document recites that possession of the properties was delivered forthwith and provides that a sale deed should be executed and registered within a month from that date, and that, in case of default, the promisees should be at liberty to recover the amount due to them under Ex. G. It may be mentioned here that after the second and third defendants became divided, the third defendant had conveyed, in 1935, five acres 20 cents. of land to the fourth defendant, a portion of which was included in Ex. A. Ex. B, the other document, was an indemnity letter given by the third defendant to the plaintiff and the first defendant, undertaking to indemnify them in case his wife should raise disputes regarding the sale of her land

after attaining majority, and to execute a security bond charging the indemnity on certain immovable properties belonging to him. In all these transactions the plaintiff who was a minor was represented by his mother as his guardian. As defendants 2 and 3 did not execute a sale deed as provided in the contract of sale this suit for specific performance has been brought by the plaintiff after attaining majority.

Two other suits were tried, with this suit and, though they are not before this Court now, it is necessary to make a brief reference to them. One of them was brought by the fourth defendant after attaining majority against the proposed vendees, the plaintiff and the first defendant herein, for a declaration that the contract to sell evidenced by Ex. A was not binding on her and for recovery of possession of her properties included in the contract from the vendees to whom they had been delivered in pursuance of the contract. This suit was decreed by the Courts below and a second appeal to this Court was dismissed. The other suit was filed by the first defendant for specific performance of this very contract but only in so far as it related to his half share of the properties agreed to be sold which the plaintiff and the first defendant had divided between themselves. The suit thus framed was held not maintainable, and the first defendant in consequence joined the plaintiff in preferring the appeal to the lower appellate Court, although he was not willing to join in the first instance as a co-plaintiff and hence was impleaded as a defendant.

The trial Court held that the contract was indivisible and as no specific performance could be granted in respect of the fourth defendant's properties included in the contract no decree could be passed even in respect of the second defendant's properties. It accordingly dismissed the suit. On appeal by the plaintiff and the first defendant the lower appellate Court took the view that the contract, so far as it related to the second defendant's properties, was severable and valid, and passed a decree for specific performance against the second defendant alone, confirming the dismissal of the suit against the fourth defendant. From this decision the plaintiff and the first defendant have brought S. A. No. 60 of 1943 claiming relief against the fourth defendant also, and the second defendant has preferred S. A. No. 212 of 1943 challenging the correctness of the decree in so far as it granted specific performance in respect of his properties included in the contract.

In the appeal preferred by the plaintiff and the first defendant their learned counsel Mr. Kameswara Rao rightly conceded that in view of the decision in the fourth defendant's suit already referred to which has become final, he could no longer claim specific performance in respect of her properties included in the contract of sale. He urged, however, that his clients were entitled to a decree for half the sum of Rs. 2,004 either as "prepaid purchase money" or as balance due under Ex. G, after adjusting the value of the properties of the second defendant (in respect of which specific performance has been decreed) towards his share of the liability. In the plaint, the alternative claim for money in case specific performance was refused was made on the footing that by the contract of sale the debt due by defendants 2 and 3 to the plaintiff and the first defendant became discharged, and that, therefore, the amount of that liability should be regarded as purchase money paid in advance for the properties agreed to be sold. It is obviously impossible to sustain the claim on this basis which was evidently put forward with a view to avoid scaling down under the Madras Agriculturists' Relief Act. The debt due by defendants 2 and 3 far from being discharged by the mere executory contract, Ex. A, was actually renewed under Ex. G on that every day and it was also expressly provided in the contract that the plaintiff and the first defendant should be entitled to recover the amount due to them in default of due execution of the sale deed. It is thus clear perfectly that the debt due by defendants 2 and 3 was kept alive and was intended to be enforced as such if for any reason the contract was not duly performed. No question therefore of refund of "prepaid purchase money" arises. We are, however, inclined to allow the claim on the basis of the promissory note Ex. G. All the facts including the execution of this promissory note were stated in the plaint and there is no dispute as to these facts. The fact that the plaintiff

attempted to circumvent the provisions of the Agriculturists' Relief Act by a misstatement of the legal effect of the contract in his plaint is no ground for refusing such relief as he may be found entitled to on a correct view of the facts. As we are holding, in the connected appeal, that the contract Ex. A is severable in respect of the second and fourth defendants' properties and is specifically enforceable against the second defendant, we are of opinion that the plaintiff and the first defendant are entitled to a decree against the third defendant for his share of the debt due under the promissory note, Ex. G. As the third defendant was not a party to the earliest promissory note of 1930, but joined in the execution of the note of 1933, the amount payable by him as scaled down under sec. 9 of the Agriculturists' Relief Act will be Rs. 1,002 with interest at five per cent. per annum till 22nd March 1938 and thereafter at $6\frac{1}{4}$ per cent. per annum simple interest till date of payment. The appeal (S. A. No. 60 of 1943) is accordingly allowed and there will be a decree against the third defendant for the sum aforementioned. As the plaint did not disclose the true basis of the claim against the third defendant as now put forward there will be no order as to costs against him in any of the Courts. As against the fourth defendant the appeal is dismissed.

Turning to the other appeal preferred by the second defendant his learned counsel Mr. Rangachari contended that the contract in question was not severable and having been held to be unenforceable as against the fourth defendant could not be specifically enforced even in respect of the second defendant's properties included therein. He submitted that there was no indication in Ex. A that the second and fourth defendants were selling the properties respectively belonging to them each for half the purchase money specified as suggested for the plaintiff and that, on the contrary, the default clause relegating the parties to their rights and liabilities under the promissory note Ex. G which made the second and third defendants jointly and severally liable for the whole amount of Rs. 2,004, showed that the contract was regarded as an indivisible transaction. This argument might have some force, if the question had to be decided on Exs. A and G alone. But, as we have already observed, these documents must be read with the indemnity letter Ex. B, all the three forming part of the same transaction, and that document which was executed by the third defendant to the plaintiff and the first defendant recites,

"towards my share of the debt relating to the promissory note caused to be executed and delivered this day for a sum of Rs. 2,004 in your favour by myself and my brother, I have sold to you the wet seri land of the extent of one acre 25 cents as guardian on behalf of my wife and have caused a sale contract to be executed and delivered this day itself."

This read with Ex. A clearly shows that defendants 2 and 4 were selling two distinct items of property of an equal extent, namely, one acre 25 cents severally belonging to them, each for half the amount specified in the contract. No doubt in case of default the defendants 2 and 3 were to be jointly and severally liable for the whole amount of Rs. 2,004 under Ex. G, but, as between them each was admittedly liable for half the debt. The position, therefore, was that the plaintiff through his guardian and the first defendant jointly agreed to buy one acre 25 cents of land for Rs. 1,002 and from each of the defendants 2 and 4, in satisfaction of a debt of Rs. 2,004 due to them from defendants 2 and 3, the third defendant who was selling his wife's property as her guardian undertaking to indemnify the buyers against any loss from a repudiation of the sale by her after attaining majority. In this view, the fact that the fourth defendant has successfully impugned the contract is no reason for not allowing specific performance in respect of second defendant's property.

Mr. Rangachari's next contention was that inasmuch as the plaintiff was a minor at the time of the contract which was therefore not specifically enforceable against him, he could not claim specific performance against the second defendant for want of mutuality. The leading Indian case on the point is *Mir Sarwarjan v. Fakruddin Mohannad*¹. There a minor on whose behalf the manager of his estate entered into a contract to purchase immovable property sued, *while still a minor*,

¹. (1911) 21 M.L.J. 1156; L.R. 39 I.A. 1; L.R. 39 Cal. 232 at 235 (P.C.).

to enforce specific performance. The contract was found beneficial to him. When the case was pending in appeal in the High Court, he attained majority and accepted and ratified the contract. The High Court decreed the suit (see *Mir Sarwarjan v. Fakruddin Mohammad*¹). But their Lordships reversing the decision refused specific performance for want of mutuality in the contract, that is to say, as it could not have been specifically enforced against the plaintiff. Under the English law, while generally the test of mutuality is applied with reference to the time of the execution of the contract, it has been recognised that the persons against whom no specific performance could originally have been enforced may waive want of mutuality and enforce specific performance (see Fry on Specific Performance, 6th edition, pages 224, 225 where he cites a number of decisions illustrating waiver of mutuality). Is this exception or limitation to the doctrine of mutuality applicable in a case like the present? According to the decisions of this Court based on the ruling of the Priy Council above referred to, it would seem not. In the latter case their Lordships expressly refer to the finding of the High Court that the minor "accepted and ratified" the contract entered into by his manager for his benefit, but nevertheless held that, "as the minor in the present case was not bound by the contract there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

This has been understood to imply that the plaintiff's waiver of mutuality could not affect the applicability of the doctrine. This is the view taken in *Narayan Rao v. Venkatasubbarao*² and *Venkatachalam Pillai v. Sethurama Rao*³, where applying their Lordships' decision this Court refused specific performance of a contract entered into by a guardian on behalf of a minor although the latter claimed such relief after attaining majority and affirming the contract. It appears, however, that in both these cases, the learned Judges wrongly supposed that the plaintiff in *Mir Sarwarjan v. Fakruddin Mohammad*⁴, brought the suit after attaining majority, overlooking the fact that the suit was actually brought while he was yet a minor. This fact indeed suggests another possible view of the decision in *Mir Sarwarjan's case*⁴, that is to say, that their Lordships refused specific performance because there was no affirmation of the contract on or before the institution of the suit so as to make the remedy mutual. (See *Flight v. Bolland*⁵ where *Clayton v. Ashdown*⁶ was apparently regarded as distinguishable on the ground that the plaintiff in the latter case affirmed the contract by filing the bill after attaining majority, a distinction approved by Fry at page 219.) A recent decision of this Court in *Adinarayana v. Venkatasubbayya*⁷ on which Mr. Kameswara Rao relied would also seem to proceed on the view that want of mutuality can be waived. The facts were, however, dissimilar and no reference is made in the judgment to *Mir Sarwarjan's case*⁴, or to the decisions of this Court based thereon. Be that as it may, we are of opinion that the defence of want of mutuality cannot avail the second defendant for other reasons.

The contract sought to be enforced, although severable as regards the vendors and the properties agreed to be sold, is joint and indivisible so far as the vendees are concerned. The first defendant who was one of the persons to whom the property was to be conveyed was an adult at the time of the contract, and the consideration for the sale was to be the discharge of the debt due by the second defendant to the plaintiff and the first defendant. It has been held by a Full Bench of this Court in *Annappurnamma v. Akkayya*⁸ that one of several payees under a promissory note can give a valid discharge of the entire debt without the concurrence of the other payees. If, therefore, the second defendant had offered payment of the debt in money, the first defendant would have been bound to accept it and such payment would be a complete discharge. Can it make any difference if the second defendant offered immovable property in pursuance of a valid contract to accept

1. (1906) I.L.R. 34 Cal. 163 (F.B.).

2. (1919) 38 M.L.J. 77.

3. (1932) 64 M.L.J. 354 : I.L.R. 56 Mad. 433 (F.B.).

4. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).

5. (1828) 38 E.R. 817 : 4 Russ. 298.

6. 9 Vin. Abr. 393.

7. (1940) 1 M.L.J. 251 : I.L.R. (1940) Mad. 852.

8. (1913) 24 M.L.J. 333 : I.L.R. 36 Mad. 544 (F.B.).

such property in satisfaction of the debt? We think not. If the second defendant was thus in a position to compel the acceptance of the property by the first defendant alone in complete discharge of the debt, there would be no lack of mutuality of remedy and there is no reason why the first defendant should not be entitled to claim specific performance of the contract by the vendor, offering to give him a complete discharge of the debt. That the plaintiff might also have to be joined in the suit cannot as it seems to us affect the position, as he need do nothing in pursuance of the contract, his concurrence not being necessary for a valid discharge of the debtor. That, in substance, is the position before us. It was said that the first defendant was not willing to take a conveyance of the properties, and that was why he did not join with the plaintiff in instituting the suit and was impleaded as a defendant. As already observed, possession having been delivered in pursuance of the contract the plaintiff and the first defendant had divided the properties between them, and the first defendant desired to have a separate sale deed executed in his favour in respect only of the localised share which he had taken at the division. This is what he asks for in his written statement in this suit, and this was also the relief which he claimed in the separate suit brought against the vendor which was dismissed as misconceived. Thereafter as already observed, he joined the plaintiff in preferring the appeal to the lower appellate Court from the decision of the trial Court in the present suit. It is therefore not correct to say that he was not willing to have specific performance of the contract, and Mr. Kameswara Rao who appeared both for him and the plaintiff has strongly pressed the claim for specific performance against the second defendant. In such circumstances the decision in *Konipalle Ramiah v. Sajja Subbiah*¹ holding that it is not open to some only of the joint contractees under a contract to sell immovable property to enforce specific performance if the others do not want the property, has no application here.

The appeal (S. A. No. 212 of 1943) therefore fails and is dismissed with costs.
B.V.V. Appeal dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SHAHABUDDIN.

Sahul Hameed Rowther .. Appellant*

v.

P.R.S.A. Arunachalam Pillai and another .. Respondents.

Limitation Act (IX of 1908), Schedule I, Articles 181 and 182—Applicability—Cross decrees—Attachment before judgment—Termination—Transfer of decree for execution—Exclusion of time.

In O.S. No. 11 of 1931 on the file of the Court of the District Munsif of Tuticorin one I obtained a money decree against the second respondent on 2nd April, 1932. In O.S. No. 13 of 1932 on the file of the Sub-Court of Tuticorin the first respondent obtained a preliminary mortgage decree against the 2nd respondent and it was made final on 31st October, 1933. On 8th October, 1935, the first respondent assigned the decree to one M who on the 2nd June, 1942, assigned it to the appellant who was the son of I. In a third suit O.S. No. 95 of 1932 on the file of the Court of the District Munsif of Kumbakonam by one S against I a decree was passed in favour of S on 16th February, 1933 and he assigned it to the 2nd respondent on 27th November, 1933. The assignee caused it to be transferred to the Court of the District Munsif of Srivaikuntam for execution and on 2nd February, 1934, he applied for attachment of the decree which I had obtained against him in O.S. No. 11 of 1931 which was for a larger amount. On 24th September, 1935, the District Munsif of Tuticorin allowed the decretal debt in O.S. No. 95 of 1932 to be set-off against the decretal debt in O.S. No. 11 of 1931, on the condition that the 2nd respondent entered up full satisfaction of the decree in O.S. No. 95 of 1932 within a period of six weeks. On 2nd October, 1935, the 2nd respondent applied to the District Munsif of Srivaikuntam in O.S. No. 95 of 1932 for an order entering up satisfaction of that decree. The application was opposed by I and M and their opposition was successful and the order of the District Munsif of

*A.A.O. No. 24 of 1943.

1. (1912) M.W.N. 415.

4th April, 1944.

Srivaikuntam dated 18th December, 1935, was ultimately confirmed and the order of the District Munsif of Tuticorin dated 24th September, 1935, set aside by the High Court in Second Appeal. Meanwhile on 12th November, 1934 the 1st respondent as the holder of the decree in O.S. No. 13 of 1932 applied for a personal decree and at the same time asked for an attachment before judgment of the decree which had been obtained against the second respondent in O.S. No. 95 of 1932. On 19th November, 1934 the Subordinate Judge passed an *interim* order of attachment before judgment and on 10th August, 1935, he granted a personal decree and also made the order of attachment absolute. The attachment was actually effected on 24th September, 1935, and on 4th January, 1940, M applied for transmission of the decree to the Court of the District Munsif of Srivaikuntam for execution. The application was granted on 12th January, 1940 and M was directed to serve notice on the judgment-debtor in accordance with Order 21, rule 22, Civil Procedure Code. M however left the matter there and on the expiration of six months the transferee Court returned the decree with a certificate of non-satisfaction. On 3rd July, 1942, the appellant who was the assignee of the decree in O.S. No. 13 of 1932 applied to the Subordinate Court of Tuticorin for an order recognising the assignment to him and directing the retransfer of the decree to the Court of the District Munsif of Srivaikuntam for execution. The Subordinate Judge held the application was barred by limitation.

Held, that the first clause of Article 182 and not Article 181 of the Limitation Act was applicable to the case and that the application was time barred. It cannot be said that once there has been an order of attachment before judgment the decree which is subsequently passed remains alive until the order of attachment is cancelled.

Held further, that the time taken up in deciding the second respondent's application for set-off and the subsequent appeals could not be excluded in computing the period of limitation.

Soorayya v. Venkataratnam, (1923) 45 M.L.J. 822: I.L.R. 47 Mad. 176 disapproved.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin dated 16th November, 1942 and made in E.A. No. 194 of 1942 in O.S. No. 13 of 1932.

T. V. Muthukrishna Ayyar and *S. Ramachandra Ayyar* for Appellant.

A. Swaminatha Ayyar and *S. Thyagaraja Ayyar* for Respondents.

(This appeal coming on for hearing on 21st March, 1944, the Court, *King* and *Horwill, JJ.*, made the following):—

Order of Reference to the Full Bench (made by King, J.):—

The appellant is the assignee of the decree in O.S. No. 13 of 1932 on the file of the Subordinate Judge of Tuticorin. That was a mortgage suit and the sale of the mortgaged property was duly effected and the decree with which we are now concerned is a personal decree against the mortgagor the second respondent. That personal decree was granted on the 10th August, 1935. No application was put in by the appellant to execute this decree until the 4th January, 1940, when he applied for its transmission to the Court of Srivaikuntam. Transmission was ordered but nothing effective was done and we have been informed that the decree was returned to Tuticorin. An execution application was filed on the 3rd July, 1942, and the question before us is whether this application is or is not barred by limitation. It may be mentioned here that the object of the appellant was that he, the decree-holder in O.S. No. 13 of 1932, should execute his decree by executing a decree passed in O.S. No. 95 of 1932 in the Court of the District Munsif of Kumbakonam. That decree was attached before judgment by the appellant on an application filed in November, 1934 and the *interim* order of attachment was made absolute on the day on which the appellant obtained his personal decree in O.S. No. 13, i.e., on the 10th August, 1935. The learned Subordinate Judge of Tuticorin has held that the execution application is barred by limitation and the decree-holder, as we have already stated, has appealed.

On the face of it the first of these two applications for execution filed in 1940 four and a half years after the passing of the personal decree must be barred by limitation under the provisions of Article 182 of the Limitation Act. It is, however, contended first of all for the appellant that under paragraph 5 of the third column of Article 182, this application is in time as it was made less than three years after the final order of a Court on an application to take some step-in-aid of execution. In order to understand this contention, further facts and dates have to be stated. We have already mentioned that the aim of the execution proceedings taken by the appellant is to execute the decree in O.S. No. 95 of 1932 of which his judgment-debtor is the decree-holder. It was held on the 21st January, 1937, by the Subordinate Judge, Tuticorin in appeals against certain orders that the decree in O.S. No. 95 of 1932 should be declared to be fully satisfied. On the 3rd May, 1937, the appellant filed a civil revision petition to the High Court against this order of the learned Sub-

ordinate Judge recording full satisfaction of the decree. It is now argued that the application to the High Court in May, 1937, which was not finally disposed of until September, 1939, was a step-in-aid of execution. It is clear from the language of Article 182 itself that the action of the appellant in filing the civil revision petition cannot be claimed as such a step-in-aid. Paragraph 5 of the third column of Article 182 requires that the application for a step-in-aid of execution must be taken to "the proper Court". Explanation II to the third column of Article 182 lays down that "proper Court" means the Court whose duty it is to execute the decree or order. There can be no doubt whatever that the High Court is not such a proper Court within the meaning of that Article and that therefore any application of any kind made to the High Court cannot be a step-in-aid under Article 182.

The next contention of the appellant is based upon a ruling of a single Judge of this Court in *Mangamma v. Narayanappa*¹. That was a case in which a decree for money had been passed in 1922 and that decree had been declared satisfied on the application of the judgment-debtor in 1924. This order was reversed in April, 1926 and then in 1928 the decree-holder applied for execution of the decree. It was held on a consideration of the meaning of the expression "date of the decree" in Article 182 (1) that that portion of the Article could not literally apply to the facts and therefore the application would have to be governed by Article 181 and the application of the decree-holder was held to be in time. It does not seem to us that this decision deals directly with facts similar to those before us. Here, there can be no doubt that the decree of which the appellant is the decree-holder, i.e., the decree in O.S. No. 13 of 1932, has never been declared to be fully satisfied. There has therefore been no technical obstruction of any kind to the execution of the decree in O.S. No. 13 of 1932. The analysis of the meaning of the words "date of the decree" given by Krishnan Pandalai, J., therefore does not apply to the facts of the present case and the expression can mean only what it appears on its surface to mean, and therefore an application filed more than three years after the date of the decree must, if Article 182 is to be taken as applicable to its disposal, be held to be barred.

There is however still a third way in which it has been contended for the appellants that the present application is not barred by limitation. According to that contention the application falls not under Article 182 but under Article 181, and time began to run under that Article only on the 22nd September, 1939, when the High Court reversed the order of the Subordinate Judge of Tuticorin passed on the 21st January, 1937. In support of the contention that Article 181 applies, reliance was placed upon a decision of a Bench of this Court in *Soorayya v. Venkataratnam*². The facts in that case were that certain properties belonging to a judgment-debtor had been attached before judgment. After the decree was passed against the judgment-debtor, a claim petition was put in by a third party and was allowed. After that order had been passed, the decree-holder filed a suit and had the order set aside. When he had thus successfully established the title of his judgment-debtor to the properties in question, he filed an execution application to proceed against those properties. That application was more than three years from the date of the decree. It was held in the circumstances that the application was governed by Article 181 and not by Article 182 and that it was filed in time as it was within three years of the date of the decree in the suit to set aside the order on the claim petition. This decision does not of course deal with precisely similar facts with those now before us, but most of the facts are similar. In both the cases certain property alleged by the plaintiff in a suit to be the property of the defendant was attached before judgment. In both cases there was no formal application in execution to proceed against that property until more than three years after the date of the decree. The decision in *Soorayya v. Venkataratnam*², that Article 182 does not apply and Article 181 applies is based upon the principle that there was during part of the interval between the date of the decree and the date of the execution petition a legal bar which prevented the filing of any execution application. We think the situation as between the parties in this case is essentially the same as the situation in *Soorayya v. Venkataratnam*², even though it was argued for the respondent that it can be legally distinguished. The ground of distinction in principle was that there has been no bar at all to the execution of the decree in O.S. No. 13, but the importance of that distinction disappears on a perusal of the facts of the two cases. We consider that in both cases there has been a bar not against proceeding in execution in general, but only in respect of some particular items of property alleged to belong to the judgment-debtor. No doubt a further ground of distinction is discernible, namely, that the reason why an execution could not be filed in *Soorayya v. Venkataratnam*², was because the Court in which that execution could alone be filed had already decided that the property belonged to some one other than the judgment-debtor, whereas the decision in the present case was not the decision of the Court which passed O.S. No. 13 of 1932 but the decision of the appellate Court in connection with O.S. No. 95 of 1932. But the essential object of the applicant was to execute O.S. No. 95 of 1932. And it is clear that so long as the judgment of the Subordinate Judge passed on the 21st Janu-

1. (1933) 65 M.L.J. 747.

Mad. 176.

2. (1923) 45 M.L.J. 822: I.L.R. 47

ary, 1937, was in force, although the appellant might formally have filed an execution application before the Court of the Subordinate Judge of Tuticorin to transmit his decree to some other Court, the moment he attempted to take any effective proceedings in execution, he would be met with the adjudication that the decree in O.S. No. 95 of 1932 had already been declared to be fully satisfied. In these circumstances we are of opinion that if *Soorayya v. Venkataratnam*¹, is to be regarded as still good law, we would in logic be compelled to extend the principles upon which it was decided to the facts of the present case, and to hold that the application of the appellant here was filed under Article 181 and that limitation in his case began to run from the 20th September, 1939.

It is strenuously contended however, for the second respondent here that *Soorayya v. Venkataratnam*¹, is not good law and we think this contention is a sound one. It was pointed out by Mr. Swaminatha Aiyar for the second respondent that the decision in *Soorayya v. Venkataratnam*¹, is based in the first instance upon a somewhat ill-advised concession by the counsel who appeared in that case, that two prior decisions had established the principle that Article 181 and not Article 182 applied to certain circumstances. One of the cases was *Chalavadi Kotiah v. Poloori Alimelammah*². There it was held that an execution application had been wrongly dismissed and that although the formal order was one of dismissal, the legal effect of the order was a mere direction to the officer of the Court to remove the application from the pending list. Such a direction did not in fact close the proceedings and the execution application must be considered still pending. In those circumstances there would be no limitation running against the decree-holder until three years after the pendency of the petition had come to an end. It will be clear that there was no adjudication in that case that Article 181 applied to the facts. The second case quoted in *Soorayya v. Venkataratnam*¹ was a decision of the Privy Council in *Rameshwar Singh v. Homeshwar Singh*³. That decision was based upon the interpretation by the Privy Council of Article 182, paragraph 1 in the third column. It was held that the decree in that case was incapable of execution on the date on which it was passed and therefore the first clause in the third column of Article 182 prescribing the date of the decree as the starting point of limitation was unworkable on the facts of that case. It followed necessarily that Article 182 could not be applied at all and therefore Article 181 must be applied. It is clear that *Rameshwar Singh v. Homeshwar Singh*³, could easily have been distinguished had counsel chosen to distinguish it from the facts in *Soorayya v. Venkataratnam*¹, where there was no question of the inexecutability of the decree on the very date on which it was passed. Apart from the decision of the learned Judges in *Soorayya v. Venkataratnam*¹, to extend the applicability of Article 181 from the facts dealt with in *Chalavadi Kotiah v. Poloori Alimelammah*², and those dealt with in *Rameshwar Singh v. Homeshwar Singh*³ to the case before them where there had been no execution application at all but only an attachment of certain property before judgment, no specific reasons are given based upon an analysis of the two Articles in the Limitation Act for the decision of the Court. It seems to us impossible to hold that the application in *Soorayya v. Venkataratnam*¹ equally with the application in the case before us does not clearly fall under Article 182. It is in both cases an application for the execution of a decree and in neither case is it an application which can be said to be one impossible of being brought within the various provisions of the third column of Article 182. It is only if Article 182 can be definitely excluded that any question of the applicability of Article 181 can arise and we are of opinion after a careful consideration of the decision in *Soorayya v. Venkataratnam*¹, that no good reasons have been assigned for the exclusion of Article 182 on the facts of that case. Although, therefore, as we have explained, we would be prepared to extend the principle of *Soorayya v. Venkataratnam*¹, to the facts of the case now before us, we cannot but feel that the decision in *Soorayya v. Venkataratnam*¹, is itself wrong and that it requires reconsideration by a Full Bench of this Court.

Under rule 2, therefore, of the Rules of the High Court, Madras, Appellate Side, we refer to a Full Bench the decision of this appeal.

(In pursuance of the aforesaid Order of Reference, this appeal coming on for hearing.)

The Judgment of the Court was delivered by

The Chief Justice.—The learned Judges who have referred this appeal to a Full Bench have done so because they are of the opinion that the decision of this Court in *Soorayya v. Venkataratnam*¹ requires reconsideration. We consider that the opinion is well founded, but as the whole appeal has been placed before us it is necessary for us to travel further afield.

1. (1923) 45 M.L.J. 822: I.L.R. 47 71.
Mad. 176.

3. (1920) 40 M.L.J. 1: L.R. 48 I.A.

2. (1907) 18 M.L.J. 46: I.L.R. 31 Mad. 17 (P.C.).

The facts are somewhat complicated and in order to appreciate the position we have to bear in mind what has happened in three suits. The first of the suits is O.S. No. 11 of 1931 of the Court of the District Munsif of Tuticorin. It resulted in a money decree being obtained by one Ibrahim against the second respondent on the 2nd April, 1932. The second case is O.S. No. 13 of 1932 of the Court of the Subordinate Judge of Tuticorin. Here the first respondent obtained a preliminary mortgage decree against the second respondent. This was made final on the 31st October, 1933. On the 8th October, 1935, the first respondent assigned the decree to one Mohideen, who on the 2nd June, 1942, assigned it to the appellant, who is the son of Ibrahim. The third suit is O.S. No. 95 of 1932. It was filed in the Court of the District Munsif of Kumbakonam by one Srinivasa Chettiar against Ibrahim. He obtained a decree on the 16th February, 1933 and on the 27th November, 1933 he assigned it to the second respondent, who caused it to be transferred to the Court of the District Munsif of Srivaikuntam for execution. Therefore the position was that Ibrahim and the first respondent had each obtained a decree against the second respondent, who had become entitled to a decree against Ibrahim.

On the 2nd February, 1934, the second respondent, as the assignee of the decree in O.S. No. 95 of 1932, applied for the attachment of the decree which Ibrahim had obtained against him in O.S. No. 11 of 1931, which was for a larger amount. He obtained an order of attachment and on the 20th March, 1934, he applied to the District Munsif of Tuticorin to enter up satisfaction in O.S. No. 11 of 1931 to the extent of the amount of the decree held by him in O.S. No. 95 of 1932. On the 24th September, 1935, the District Munsif of Tuticorin passed an order on the second respondent's application for set-off. He allowed the decretal debt in O.S. No. 95 of 1932 to be set-off against the decretal debt in O.S. No. 11 of 1931 on the condition that the second respondent entered up full satisfaction of the decree in O.S. No. 95 of 1932 within a period of six weeks.

On the 2nd October, 1935, the second respondent applied to the District Munsif of Srivaikuntam in O.S. No. 95 of 1932 for an order entering up satisfaction of that decree. The application was opposed by Ibrahim and Mohideen. Their opposition was successful. By an order dated the 18th December, 1935, the District Munsif refused to enter up satisfaction. This order resulted in the second respondent filing A.S. No. 19 of 1936 in the Court of the Subordinate Judge of Tuticorin against the District Munsif's order. Ibrahim had filed A.S. No. 111 of 1935 and Mohideen A.S. No. 121 of 1935 in the same Court against the order passed by the District Munsif of Tuticorin allowing part satisfaction to be entered up in O.S. No. 11 of 1931, conditional on the second respondent entering up satisfaction in O.S. No. 95 of 1932. A.S. No. 19 of 1936 was allowed and A.S. Nos. 111 and 121 of 1935, were dismissed. The dissatisfied parties carried the matters to this Court, either by way of appeal or civil revision petition. The final result was that the order of the District Munsif of Srivaikuntam of the 18th December, 1935, was upheld and the order of the District Munsif of Tuticorin of the 24th September, 1935, was set aside.

We must now return to O.S. No. 13 of 1932. On the 12th November, 1934, the first respondent, as the then holder of the decree in that suit, applied for a personal decree and at the same time asked for an attachment before judgment of the decree in O.S. No. 95 of 1932 which was held by the second respondent. On the 19th November, 1934, the Subordinate Judge passed an interim order of attachment before judgment. On the 10th August, 1935, he granted the first respondent a personal decree and at the same time he made the order of attachment before judgment absolute. The attachment was actually effected on the 24th September, 1935. Nothing was done by way of enforcing payment of the personal decree until the 4th January, 1940, when.

Mohideen, as the holder applied to the Subordinate Judge for an order directing its transmission to the Court of the District Munsif of Srivaikuntam for the purpose of execution. The application was granted on the 12th January, 1940, and Mohideen was directed to serve notice on the judgment-debtor in accordance with Order XXI, rule 22, Civil Procedure Code. Mohideen left the matter there and on the expiration of six months the District Munsif of Srivaikuntam directed the decree to be returned to the Court of the Subordinate Judge of Tuticorin with a certificate of non-satisfaction.

On the 3rd July, 1942, the appellant, who was then the assignee of the decree in O.S. No. 13 of 1932 applied to the Subordinate Court of Tuticorin for an order recognising the assignment to him and directing the retransfer of the decree to the Court of the District Munsif of Srivaikuntam for execution. The Subordinate Judge held that the application was barred by the law of limitation and consequently dismissed it without going into the merits. The present appeal is from that decision. The learned Judges who have made this reference have indicated that they are in agreement with the Subordinate Judge.

For the appellant it is said that the decree in O.S. No. 13 of 1932 remained alive by reason of the application which Mohideen had made on the 4th January, 1940, for its transmission to the Court of the District Munsif of Srivaikuntam. If the decree were then alive, no doubt this application would be sufficient to start another period of limitation; but the question in this case is whether the decree was alive on the 4th January, 1940. As we have pointed out, it was passed on the 10th August, 1935, and more than four years had elapsed. The learned advocate for the appellant says that the attachment before judgment had the effect of keeping the decree alive indefinitely, irrespective of any application for execution. In other words he maintains that once there has been an attachment before judgment the decree which is subsequently passed remains effective until the attachment is removed, however many years may pass in the meantime. The learned advocate here relies on certain observations of Coutts-Trotter, J., in *Meyyappa Chettiar v. Chidambaram Chettiar*¹, and the judgment of Pandrang Row, J., in *Ramanadhan v. Veerappa*². He has advanced two further contentions. One is that Article 181 and not Article 182, Limitation Act applies and the other is that, even if Article 182 applies, the decree was still alive on the 3rd July, 1942, when the appellant applied for the re-transmission of the decree to the Srivaikuntam District Munsif's Court.

We are unable to accept the argument that once there has been an order of attachment before judgment, the decree which is subsequently passed remains alive until the order of attachment is cancelled. This contention is contrary to the provisions of the Limitation Act. Article 182 (1) provides that in respect of the execution of a decree or order of a Civil Court, not provided for by Article 183 or by section 48, Civil Procedure Code, the period of limitation is three years and commences from the date of the decree or order. In our judgment this decree falls within Article 182. Section 9 of the Limitation Act states that once time has begun to run, no subsequent disability or inability to sue stops it. Order 38, rule 11, Civil Procedure Code makes it clear that where there has been an attachment before judgment, it is unnecessary to apply for a further order of attachment; but it makes it equally clear that there can be no order for execution without an application in that behalf, and Article 182 of the Limitation Act requires the decree-holder to do this within three years.

In *Meyyappa Chettiar v. Chidambaram Chettiar*, Coutts-Trotter, J., said that he was unable to see that there was any difference in *rerum natura* between an attachment before judgment and an attachment in execution of decree,

1. (1923) 46 M.L.J. 415: I.L.R. 47 Mad. 483 (F.B.).

2. A.I.R. 1937 Mad. 84.

except that the one was prospective and, after the condition was fulfilled which brought it into active operation, namely the obtaining of a decree, it conferred a priority in time. An attachment before judgment was not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. These are the observations on which the learned advocate for the appellant so much relies, but the learned Judge was not there discussing the questions with which we are concerned, and it is manifest from what he had said before that he was not intending to imply that an attachment before judgment operates to keep alive the subsequent decree until the attachment is removed, however lengthy may be the interval. Earlier in the judgment he said that it appeared to him that Order 38, rule 11 provided that, when property had been attached before judgment, it remained attached when "in due course" after judgment the decree-holder applied for execution of his decree.

In *Ramanadhan v. Veerappa*¹, Pandrang Row, J., after referring to the observations of Coutts-Trotter, J., in *Meyyappa Chettiar v. Chidambaram Chettiar*² said:

"The *ratio decidendi* of the Full Bench case appears to be that there must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. No doubt in ordinary cases such an election or declaration of intention would be made by presenting an execution application. But it does not seem that in every case without exception it should be done in this manner and in no other. If intention to execute can be inferred from other circumstances, there can be no doubt in this case there was an intention to execute as is apparent from the fact that the respondents impleaded themselves in the appeals pending in the High Court in connexion with O.S. No. 153 of 1910 and were appearing in those appeals till the very end."

It is said that here Pandrang Row, J., was laying down the proposition that an intention to execute is all that is necessary to keep an attachment before judgment alive. It matters not whether the decree-holder applies for execution provided that an intention to do so is to be gathered from what has happened in other proceedings. In this connection the learned advocate for the appellant points to the fact that the first respondent had opposed the second respondent's application to have the decree in O.S. No. 95 of 1932 set-off by way of part satisfaction of the decree in O.S. No. 11 of 1931.

If the opinion expressed by Pandrang Row, J., is correct in law, the first respondent's action would probably have been sufficient for the appellant, but we are unable to accept what the learned Judge said in *Ramanadhan v. Veerappa*¹, as correctly expressing the law. Whether an attachment before judgment continues indefinitely after judgment cannot depend on what has happened in other proceedings. For continuance beyond three years from the date of the decree an application for execution must be filed within that period, otherwise the decree-holder loses his remedy.

We have said sufficient to indicate that we do not agree that Article 181 applies in this case, as the appellant would have it, and this is a fitting stage at which to make reference to *Soorayya v. Venkataratnam*,³ That case was decided by Krishnan and Odgers, JJ. The facts were these. A decree-holder had obtained an attachment before judgment. A third party objected to the attachment and his objection was allowed. Consequently the decree-holder was compelled to file a suit to establish his right to sell the properties in execution. The suit was successful, whereupon the decree-holder applied for the sale of the properties attached before judgment. By this time more than three years had elapsed from the date of the decree and the judgment-debtor contended that the decree had become time barred. The argument was rejected on the ground that

1. A.I.R. 1937 Mad. 84.

3. (1923) 45 M.L.J. 822; I.L.R. 47

2. (1923) 46 M.L.J. 415; I.L.R. 47 Mad. 176.

Mad. 483 (F.B.).

Article 181 of the Limitation Act was applicable and the period of three years ran from the date of the removal of the obstruction. We consider that the learned Judges here erred. Article 181 is a residuary article. It cannot be applied if the case falls within Article 182, and in our opinion Article 182 applied. In the course of the judgment it was said:

"The question thus before us is whether the view taken by the District Munsif that the present application is an application which could be treated as one for reviving the execution proceedings already commenced can be supported or not. It is clear from the authorities that, when an execution application is brought and properties are attached in execution of the application if any obstacle is placed in the way of the properties being sold and assets realised for the purpose of meeting the decree debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Article 182 of the Limitation Act, but is in the nature of a revival of the original application and Article 181 of the Limitation Act will apply It is, however, contended by the learned Vakil for the respondent before us that that principle will not apply in the case of an attachment before judgment unless it had been followed by an application for execution of the decree after the decree was passed. We are unable to accept that contention. Under the Code the attachment before judgment ensures to the benefit of the decree-holder when the decree is passed so that it is no longer necessary to attach the property—*Vide* Order 38, rule 11 of the Civil Procedure Code". We cannot accept this as an accurate statement of the legal position. As we have already pointed out, rule 11 of Order 38 contemplates an application for execution which the learned Judges in this case did not really appreciate. The fact that there the execution proceedings were interrupted and it became necessary for the decree-holder to get his right of sale declared did not take the case out of Article 182 and relegate it to the residuary Article. In *Rangiah Goundan and Co. v. Nanjappa Rao*¹, it was pointed out that the criterion for determining whether Article 179 or 178 of the old Limitation Act—these correspond to Articles 182 and 181 of the present Act—applied to a particular application was to ascertain whether any one of the six points of time specified in column 3 of Article 179 was applicable to it, and if none of them was applicable, only then would Article 178 apply. The first clause of Article 182 applies here and therefore the case cannot fall within Article 181.

There is no substance at all in the contention that the time taken up in deciding the second respondent's application for set-off and the subsequent appeals should in any event be excluded. Those proceedings had nothing to do with the decree obtained in O.S. No. 13 of 1932 which throughout remained executable, notwithstanding what was transpiring or had transpired in the Court of the District Munsif of Tuticorin and in the Court of the District Munsif of Srivaikuntam.

For these reasons the appeal is dismissed with costs in favour of the second respondent and these will include the costs of the hearing before King and Horwill, JJ.

B. V. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Srila Sri Ambalavana Desika Pandara Sannathi, Trustee of
Peria Avidaiar Koil Devasthanam, represented by power
agent, Namasivayya Thambiran

*∴ Petitioner**

v.

Arumugam Ambalagaran and another

∴ Respondents.

Madras Estates Land Act (I of 1908), section 205—Revisional jurisdiction of District Collector—Scope—High Court's powers of revision—When available.

1. (1903) 13 M.L.J. 412: I.L.R. 26 Mad. 780.

*C.R.P. Nos. 668 and 674 of 1943.

8th August, 1944.

A landlord put in a petition under section 74 of the Madras Estates Land Act for the appraisalment of the crop and division of the produce between him and the tenants who had acquired occupancy rights under Act XVIII of 1936. The Deputy Collector deputed a Revenue Inspector to make the necessary inquiry. The ryots stated that they had not been paying rent and that none was due from them. The Revenue Inspector submitted his award (based on the rates prevailing in an adjacent village) along with a report of his proceedings to the Deputy Collector who confirmed the award as no objection was raised before him. No appeal was filed in the District Court but the ryots took the matter to the District Collector asking him to exercise his revisional jurisdiction under section 205 of the Estates Land Act. The District Collector set aside the award on the ground that the Deputy Collector should not have accepted the award based on rates prevailing in an adjacent village but should have made further inquiries though there had been no objection from either side. On revision,

Held: (i) With regard to the question whether rent was payable at all and whether it was payable by division or appraisalment, the Deputy Collector acted as a "Court", because on that particular point an appeal lay to the District Court, and, in respect of it, it is the High Court and not the District Collector who will have jurisdiction to revise.

(ii) With regard to the actual rent payable, as no appeal lay to the District Court, the Revenue Inspector's decision which was confirmed by the Deputy Collector was not the decision of a Court and could therefore be interfered with under section 205 of the Estates Land Act.

(iii) In the circumstances, the order of the District Collector was liable to be set aside as one made without jurisdiction.

Petitions under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Collector, Tanjore, dated 17th May, 1943, and passed in R.P. Nos. 43 and 44 of 1943 preferred against the orders of the Court of the Deputy Collector of Pattukottai, dated 2nd March, 1943, and passed in M.A. Nos. 212 and 213 of 1943 respectively.

M. S. Venkatarama Aiyar and *Mahadeva Aiyar* for Petitioner.

A. V. Narayanaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—These revision petitions concern a dispute between an inamdar and his tenants, who have admittedly under the Amendment of 1936 acquired occupancy rights.

The landlord, who is the petitioner here, put in an application to the Deputy Collector of Pattukottai Division under section 74 of the Estates Land Act, asking the Deputy Collector to take action under that section for the appraisalment of the crop and division of the produce. The procedure to be adopted by the Collector under section 75 upon receiving such an application was followed; and the Deputy Collector deputed a Revenue Inspector to make the necessary inquiry. The ryots, in written statements of their claim, stated that they had not been paying rent and that none was due from them. If an objection is taken during such inquiry before the deputed officer that the rent is not payable by division or appraisalment or that no rent is payable, the officer so deputed has no authority to consider that question himself. He has merely to record the objection; and if he has made his award, he has to submit it to the Collector along with a report of his proceedings, and if an objection is specifically raised that rent is not payable by division or appraisalment or that no rent at all is payable, the objection also has to be forwarded. The Collector has then to hear any objections, and after further inquiry, if necessary, has to pass orders. Such orders are final, except that if an objection that no rent is payable or that it is not payable by division or appraisalment is raised, the order of the Collector is subject to the result of an appeal to the District Court. No objection was raised before the Deputy Collector, and he confirmed the award of the Revenue Inspector. No appeal was filed in the District Court. The ryots, however, took the matter to the District Collector and asked him to exercise his revisional jurisdiction under section 205 of the Act. The District Collector set aside the award saying:

"But it appears from the report of the Revenue Inspector who passed the award that he had accepted (without taking evidence) the fact that there had never been any division of crops in the village, and based his award on the rate prevailing in an adjacent village. Such a procedure is absolutely unauthorised under the Act and the Revenue Divisional Officer should not have accepted an award based on this. He has powers under the Act to make further enquiry and should have used them in spite of the fact that there was no objection from either side".

The main question to be decided in those petitions is whether the District Collector had jurisdiction to pass the order he did under section 205. That would depend upon the question whether the Deputy Collector in passing his order was a Court or not. This Court has jurisdiction to interfere in revision under section 115 only in the case of Courts subordinate to the High Court. If the Deputy Collector passed his order as a Court, then he did so as a Court subordinate to the District Court, and as the District Court is subordinate to this Court, this Court would have jurisdiction to interfere under section 115, from which it would follow that the District Collector had no jurisdiction to interfere under section 205. Mr. A. V. Narayanaswami Aiyar relies on *Raghu-nadha Patro v. Govinda Patro*¹, in which it was held that the High Court had no jurisdiction to interfere with an order of the Board of Revenue passed under section 205 if the order with which the Board interfered was not the order of a Court. In the case under consideration, there can be no doubt that with regard to a part of the matter in dispute between the landlord and the tenant, the Deputy Collector did act as a Court, because on that particular point an appeal lay to the District Court. That part was with regard to the question whether rent was payable at all and whether it was payable by division or appraisement. In such cases it was held in *Mahant Prayag Dossjee v. Chinna Rama Naidu*², that this Court had jurisdiction and that the District Collector had not. The learned Judges in that case considered the Full Bench decision in *Raghu-nadha Patro v. Govinda Patro*¹, and said:

"We do not think that the authority of *Paramaswamy Aiyengar v. Alamelu Nachiar Ammal*³ and *Ramaswami Goundan v. Kali Goundan*⁴, has been in any way affected by the Full Bench in *Raghu-nadha Patro v. Govinda Patro*¹, or by the decision of a larger Full Bench in *Raja of Mandasa v. Jagannayakulu*⁵. The two Full Bench decisions were in cases in which the High Court considered the question of revising proceedings of the Board of Revenue under Chapter XI of the Estates Land Act which deals with Survey, Settlement and Record of Rights. The basis of the decision in the case of the *Raja of Mandasa v. Jagannayakulu*⁵, was that in exercising their functions under Chapter XI, the Revenue authorities were not acting as Courts".

The learned Judges went on to say that in the matter they were considering the Revenue authorities were acting as Courts and that therefore section 115 applied and the High Court had jurisdiction to interfere with the decision of the Revenue Officers.

With regard to the other part of the District Collector's order, namely, that dealing with the actual rate payable, it would seem that as no appeal lay to the District Court, the Revenue Inspector's decision, which was confirmed by the Deputy Collector, was not the decision of a Court and could therefore be interfered with in revision under section 205.

The only other question is whether this Court should interfere in revision. It has been argued with a great deal of substance that the ryots were ignorant of the procedure to be adopted by them and that all that the District Collector did was to give them another opportunity of putting forward their case which would be impossible if the District Collector's order be not upheld. While seeing the force of this argument, I feel that if this petition is dismissed, a difficulty will arise in subsequent proceedings, because if the matter is taken

1. (1928) 55 M.L.J. 798 (F.B.).	4. (1918) 30 M.L.J. 571: I.L.R. 42
2. (1933) 68 M.L.J. 324.	Mad. 310.
3. (1918) 35 M.L.J. 632: I.L.R. 42	5. (1931) 63 M.L.J. 450: I.L.R. 55
Mad. 76.	Mad. 883 (F.B.).

to the District Court under section 75 (8) (e), it would be open to the landlord to contend that the new order passed by the Deputy Collector in accordance with the direction of the District Collector was without jurisdiction and should therefore be set aside. I therefore feel that no other course is open to me but to declare that the order of the District Collector is without jurisdiction and that the Deputy Collector has therefore no jurisdiction to consider any objection raised by the ryots that no rent is payable or is payable by division or appraisement.

The respondent will pay the costs of the petitioner in these proceedings.

K. S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Pallipurath Parameswaran Nambisan's son, family head and
manager, Narayanan Nambisan

*Appellant**

v.

Thachayakunnathil Puthen Veettil Madathil Narayani Amma's
son Krishnan Nair (deceased) and others

Respondents.

Civil Procedure Code (V of 1908), section 105—Scope—Suit for redemption of kanom—Interlocutory application by defendant, for renewal of kanom—Application dismissed due to non-deposit of renewal fee, etc.—No appeal preferred against the order—Redemption suit decreed—Contention on appeal therefrom questioning correctness of order on interlocutory petition—Matter could be gone into in the appeal.

There is nothing in the first part of section 105, Civil Procedure Code to indicate that in cases where an appeal is provided, a defect in an order affecting the decision of the case cannot be set forth as a ground of objection in the memorandum of appeal against the decree in the suit merely because no appeal has been filed against the order.

In a suit for redemption of a kanom the defendant pleaded that he was entitled to a renewal of the kanom and filed a petition under the Malabar Tenancy Act praying for such renewal. The District Munsif ordered the renewal, but as the renewal fees, etc., were not deposited by the defendant he dismissed the petition and decreed the suit. No appeal was preferred by the defendant against the order on the petition though an appeal was provided for in the Act. But in an appeal against the decree in the redemption suit objections were raised regarding the correctness of the order on the petition. On a contention that the order on the defendant's petition had become final as no appeal was preferred against it and that it was not open to him to agitate that question in the appeal against the decree for redemption,

Held, that the correctness of the order on the renewal application as regards the amount to be paid as renewal fees and the period for which the lease is to be granted is one that could be canvassed and considered in the appeal against the decree in the redemption suit.

Pichu Ayyangar v. Ramanuja Jeer Swamikal, (1940) 1 M.L.J. 882; I.L.R. (1940) Mad. 901 and *Neelakandan Nambudripad v. Krishna Iyer*, (1943) 1 M.L.J. 325 followed.

Appeal against the order of the Court of the Subordinate Judge, Ottapalam, dated 29th December, 1942 and made in A.S. No. 154 of 1942 preferred against the decree of the Court of the District Munsif of Walluvanad dated 25th February, 1942 and made in O.S. No. 52 of 1941.

K. P. Ramakrishna Aiyar for Appellant.

P. Govinda Menon for Respondents.

The Court delivered the following

JUDGMENT.—The appeal arises out of a suit for redemption of a kanom filed by the appellant in the District Munsif's Court of Walluvanad. The defendant pleaded that he was entitled to get a renewal of the kanom and also raised other contentions. He further filed a petition under the Malabar Tenancy Act praying for a renewal being granted. The learned District Munsif ordered the renewal by order on I.A. No. 792 of 1941. But as the renewal fee and the arrears of rent and future rent which were directed to be deposited were not

deposited he dismissed that interlocutory application and decreed the suit on 25th February, 1942. On appeal it was contended that the renewal fee fixed and directed to be paid was in excess and that the District Munsif had gone wrong in fixing the period for which renewal was to enure. It was contended for the plaintiff in appeal that the order on I.A. No. 792 of 1941, the petition filed by the defendant for the grant of a renewal had become final as no appeal was preferred against the order thereon dismissing it for non-payment of renewal fee and rent directed to be deposited and it was not open to the first defendant to agitate that question again and that as the only question raised in the appeal related to the renewal fee and the period for which renewal was to be granted, the appeal was not maintainable. The learned Subordinate Judge, following the principles of the decision of this Court in A.A.O. No. 642 of 1941, *Neelakandan Nambudripad v. Krishna Iyer*¹, and the provisions of section 105 (1) of the Civil Procedure Code, held that the matter could be gone into in appeal. He therefore allowed the appeal, set aside the order and remanded the suit and the petition, I.A. No. 792 of 1941 for fresh disposal. It is as against that order that this appeal has been filed.

The only point for consideration is whether it is open to the respondents to dispute the correctness of the order in I.A. No. 792 of 1941 when they had not filed any appeal against the order dismissing the petition, and if so, what is the renewal fee payable and from what date is the renewal to be granted. Under section 17 (a) of the Malabar Tenancy Act, a kanomdar on the expiry of the term of the kanom under which he holds is entitled to claim and his immediate landlord shall be bound to grant a renewal, enuring for a period of twelve years from the same on payment of a renewal fee of $24\frac{1}{2}$ times the balance of the annual fair rent of the lands covered by the kanom after deducting (1) the annual revenue payable on the kanom property to the Government, if payable by the kanomdar under the kanom deed, and (2) the annual interest on the kanartham and (3) the annual michavaram payable under the previous kanom. Under section 22 (1) a kanomdar is entitled to apply to the Court in the form prescribed for the execution of a renewal deed. Under section 23 (b) if the landlord sues to evict the tenant on the ground that the period of the kanom had expired and no renewal had been obtained, the tenant shall be entitled to make an application or a fresh application under sub-section (1) of section 22 and the suit shall abide and follow the result of such application. Under section 24, the Court shall determine the amount to be paid as renewal fee and make an order for the deposit within a time to be fixed by the Court of the amount payable with interest. Under section 25, if the deposit ordered under clause (ii) of section 24 is not made within the time fixed, the Court shall dismiss the application and such dismissal shall bar any subsequent application under section 22 by the tenant or those claiming under him. Section 50 provides for an appeal against an order made under section 25. In this case, there was an order under section 25 dismissing the petition as the amount ordered under section 24 to be deposited was not deposited. No appeal was filed. It is therefore urged for the appellant that the order dismissing the petition for the grant of renewal not having been appealed against and having become final, it would not be open to the Court sitting in appeal against the decree in the suit for redemption to canvass the correctness of the order on the petition for renewal. The decision in *Neelakandan Nambudripad v. Krishna Iyer*¹, was no doubt a decision in a converse case. There, in an appeal against the order on the petition for renewal it was pleaded that inasmuch as a decree had been passed in the redemption suit filed by the landlord and the tenant had not appealed against it, the question agitated in the appeal against the order on

the petition for renewal had also become final and the appeal was hence not maintainable. It was held that that was not so. It is urged for the appellant that that case was similar to an appeal against a preliminary decree, the maintainability of which could not be questioned merely because subsequent to the passing of the preliminary decree and before the disposal of the appeal therefrom a final decree had been passed and no appeal has been filed against that final decree and that in this case no appeal has been filed against the preliminary decree and the appeal was only against the final decree in which the decision in the preliminary decree is sought to be questioned. It is however urged for the respondents that, as pointed out by the learned Subordinate Judge, this is a case governed by section 105 of the Civil Procedure Code. As per section 23 (b) of the Malabar Tenancy Act, if the landlord sues to evict the tenant on the ground that the period of the kanom had expired and no renewal had been obtained, the tenant shall be entitled to make an application or a fresh application under sub-section (1) of section 22 and the suit shall abide and follow the result of such application. It is therefore contended that the petition being an interlocutory application filed by way of defence in the suit itself, the defendant has got two remedies, (i) to agitate the matter in the appeal provided under section 50 and (2) also agitate it in his appeal against the decree in the suit in which on an interlocutory application the question as to the grant of a renewal has been decided. The mere fact that the order on the interlocutory application had become final by reason of the fact that the matter was not taken to the superior Court and was decided finally would not stand in the way of the defendant exercising his right to have the matter agitated in an appeal against the decree in the suit itself. That there is some force in the contention is apparent from the decision of this Court in *Pichu Ayyangar v. Ramanuja Jeer Swamikal*. It was held in that case by a Bench of this Court that an order of the High Court in revision under section 115 on a preliminary issue relating to the maintainability of the suit holding that the suit did not lie could be questioned in an appeal to this Court from the decree dismissing the suit based on such order. That the result of the suit for redemption of the kanom is dependent on the decision of the application for renewal filed under section 23 (b) of the Malabar Tenancy Act is not disputed and is also clear from the language of section 23 (b) namely "the suit shall abide and follow the result of such application." Further, from the fact that the application is to be filed as a reply to the suit after the suit is filed, it is clear that it is to be treated as an interlocutory matter. As a matter of fact, they were treated as interlocutory applications and numbered as such. Under section 105 of the Civil Procedure Code, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. The decision of the question as to whether the tenant was not entitled to be granted renewal unless he deposited a particular amount as renewal fees, etc., is a decision which affects the decision in the suit for redemption of the kanom in which the petition for renewal was filed. Consequently in the appeal against the decree in the suit for redemption of the kanom the error or defect or irregularity in the decision with regard to the renewal could be set forth as a ground of objection. It is true that in the first portion of section 105 (1) of the Civil Procedure Code, it is stated that save as otherwise expressly provided no appeal shall lie from any order made by a Court in the exercise of original or appellate jurisdiction. But then there is nothing in that section to indicate that in cases where an appeal is provided a defect in an order affecting the decision of the case cannot be set forth as a ground of objection in the memorandum of appeal against the decree in the suit merely because no appeal has been filed against that

order. In the light of section 105 (1) and in the light of the ruling in *Pichu Ayyangar v. Ramannuja Jeer Swamigal*,¹ I think that the learned Subordinate Judge was right in finding that the question as to the validity of the order on the renewal application as regards the amount that is to be paid as renewal fees and the period for which the lease is to be granted is one that could be canvassed and considered in the appeal against the decree in the redemption suit.

With regard to the quantum of renewal fees and the period for which the lease is to be renewed, the learned Subordinate Judge has followed the latest decision of this Court in *Neelakandan Nambudripad v. Krishna Iyer*². I therefore find that the order on that portion of the case also should stand.

- In the result, the appeal fails and is dismissed with costs.

Leave refused.

V. P. S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE HORWILL.

G. F. F. Foulkes, the administrator of the estate of the late Robert

Foulkes, by authorised agent, A. Kailasam Pillai . . . *Appellant**

v.

A. S. Suppan Chettiar and another

. . . *Respondents.*

Civil Procedure Code (V of 1908), section 47 and Order 21, rule 90—Sale in execution—Appellant administrator of estate of third party and in that capacity judgment-debtor in suit—Property sold held by appellant also as receiver in another suit—No leave of Court taken for holding sale—Petition by appellant to set aside sale—Petition dismissed, the order of Court calling upon the appellant to give security in cash or immovable property not being obeyed—Validity of sale.

Property in the hands of a receiver in one suit was sold in execution of a decree obtained against him in another suit in his capacity of administrator of the estate of one F, without obtaining the leave of the Court which appointed the receiver. He filed a petition for setting aside the sale under Order 21, rule 90, Civil Procedure Code which was dismissed as the order of the Court calling upon him to give security in cash or immovable property equivalent to the sale price was not obeyed.

Held : (i) The action of the Court calling upon the appellant to furnish security was in the exercise of proper judicial discretion. Under Order 21, rule 90, the Court has 3 courses open to it, namely, (i) to dispense with security, (ii) to demand deposit of money, or (iii) to call for security in some other form. Where it adopts either of the two latter alternatives the amount of cash or the amount for which security is demanded must be one of two definite sums, either the amount mentioned in the sale warrant, or the amount realised by the sale. The third paragraph of the rule does not control the general interpretation of the rule and cannot be taken to mean that the amount for which security can be demanded is within the discretion of the Court.

(ii) The sale was not void by reason of the consent of the Court not having been taken but was only voidable; and as the consent of the Court was taken before the confirmation of the sale, the sale was perfectly valid.

Venkatanarasimha Rayanimgar v. Venkatalinga Nayanim Bahadur, (1944) 1 M.L.J. 129, referred to.

Appeal against the order of the Court of the Subordinate Judge, Sivaganga dated 29th December, 1942, in E. A. No. 425 of 1942 in E. P. No. 152 of 1941 in O. S. No. 35 of 1937 on the file of the Sub-Court of Ramnad at Madura.

T. R. Venkatarama Sastri, K. S. Sankara Aiyar and M. Sundaram for Appellant.

T. V. Muthukrishna Aiyar and A. V. Narayanaswami Aiyar for Respondents.

The Judgment of the Court was delivered by

King, J.—The appellant here is the administrator of the estate of the late Mr. Robert Foulkes. In that capacity he was the judgment-debtor in O. S. No. 35 of 1937 on the file of the Ramnad Temporary Subordinate Court and a part of the estate was brought to sale in execution and was sold on the 18th June, 1942, for a sum of Rs. 2,01,700. Shortly after the sale was held the appellant filed an application under Order 21, rule 90, to set it aside. Three days after the filing of the application, that is on the 10th July, the learned Subordinate Judge called upon the

1. (1940) 1 M.L.J. 882; I.L.R. (1940) Mad. 901.

* A. A. O. No. 75 of 1943.

2. (1943) 1 M.L.J. 325.

15th March, 1944.

applicant to deposit in Court the amount realised by the sale under the proviso to rule 90. The appellant protested against this and on the 20th July the Court modified its order by dispensing with the production of cash and asking instead for the security of immovable property for the total amount of the sale proceeds. This security was not furnished. So far therefore as the petition alleged that the sale ought to be set aside on the ground of material irregularities the learned Judge refused to enter into the merits. The petition however also raised matters which fell under section 47. It was contended that the sale was *ab initio* void as the property which was sold was in the hands of the appellant himself as receiver in another suit, O. S. No. 29 of 1936 on the file of the Subordinate Judge of Madura, and that no leave had been granted by that Court for the holding of the sale. The learned Subordinate Judge therefore decided to confine his disposal of the application to this question of the jurisdiction of the Court to hold the sale. Before the application was disposed of an order was obtained by the respondents from the Subordinate Judge of Madura granting permission to sell the property. This order was on the 28th September, 1942. Subsequently the petition was dismissed and the sale was confirmed. This is an appeal against the order dismissing the petition and confirming the sale.

In his order the learned Subordinate Judge has given two reasons for dismissing the petition. One is that the sale was not void in the circumstances but only voidable and that there was no sufficient reason to set it aside and the second that the contention of the appellant that the sale was void was barred by the principle of constructive *res judicata* as he had not raised it during the execution proceedings prior to the sale. This second point has not been argued before us and we do not propose to deal with it. The arguments of the learned counsel for the appellant in this Court have turned upon two points. The first is that it is open to the Court to consider whether the action of the learned Subordinate Judge in calling upon the appellant to furnish security under Order 21, rule 90 was in the exercise of proper judicial discretion and that if we can agree that it was not, we can ourselves call for further investigation into the merits of the petition. The second argument was that the sale was void and must be set aside in the circumstances.

The first argument will obviously depend upon a consideration of the terms of Order 21, rule 90. The portion of the rule which permits the Court to call for security is the second paragraph which runs as follows :

" Provided that the Court may after giving notice to the applicant, call upon him before admitting the application either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale whichever is less, or to deposit such amount in Court."

The obvious meaning of these words is that the Court is granted the option of taking one of three courses, either it may demand no security at all or it may demand the deposit of money in Court or it may call for security in some other form. In either of the two latter alternatives it seems clear from the wording of the sub-rule that the amount of cash or the amount for which security must be demanded must be one of two definite sums, either the amount mentioned in the sale warrant or that realised by the sale. It is however now contended for the appellant that the discretion is still wider and that the executing Court can call for security for any sum it pleases which is not greater than that laid down by the sub-rule, and in support of this argument we have been referred to the third portion of the rule. That runs as follows :

" Provided also that the security furnished or the deposit made as aforesaid shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale."

It is contended that as this third paragraph in the rule contemplates the forfeiture of money or the enforcement of the security to only a limited extent the Court cannot exercise its discretion properly without calling upon the applicant to furnish security only to what it considers likely to be that limited extent. We are quite unable to accept this argument. We are of opinion that there is nothing in the third sub-section of the rule to govern or in any way modify what is laid down so plainly in the second sub-section and apart even from this, it is clear that the third

sub-section cannot in the nature of things occupy any such prominent place in the administration of the rule. It will be obvious from a consideration of the third sub-section that it can come into operation only in very extraordinary circumstances, namely, when the Court has demanded security and then has proceeded to consider the merits of the petition and has come to the conclusion that the grounds urged in the petition justified the setting aside of the sale, in other words, when the property sold has owing to certain irregularities fetched a sum far less than it ought to have done. It is obvious in these circumstances that if the Court's decision is right the result of a re-sale is almost certain to result in a much larger sum being realised, so that there will be no opportunity in the ordinary course for the enforcement of the security against the person who has furnished it. The third sub-section of rule 90 therefore can come into operation only in the extraordinary circumstances of the Court being first satisfied that there are good grounds for setting aside the sale and then finding, no doubt to its extreme surprise, that the result of the re-sale is even less satisfactory in the matter of the sale proceeds than the result of the sale which it has set aside. This will show conclusively that the third sub-rule in rule 90 can in no sense be taken as controlling the general interpretation of the rule. We must once more repeat that according to the plain language of sub-rule (2) in rule 90 if the Court decides to demand security at all it must demand it for one or other of the exact sums mentioned in that sub-section.

We therefore are left with only one point to consider, whether the Court below has properly exercised its discretion in calling for security at all. On this matter there is no sufficient material before us to justify any finding that the order calling for security should be set aside. Much has been made in the arguments of two facts and two facts only. One is that the total amount realised at the sale is very large, Rs. 201,700 and the other is that the applicant before the learned Subordinate Judge was not suing on behalf of his own property but as the administrator of the estate of a deceased person. We can see no reason why these two facts should influence us in any way in disposing of this appeal. Whatever be the amount realised at the sale, the same principles must govern the Court in deciding whether to call for security or not, and it is obvious that an administrator in charge of the estate of a deceased person is subject to the same temptation as anybody else to exaggerate or misstate his case. No special facts relating to the position of the appellant or the previous history of this case have been put before us and the only materials on the record which were available to the Court when it passed its orders demanding security were a general protest by the appellant on the two facts which we have just mentioned. We are quite unable therefore to agree with the contention of the learned advocate for the appellant that in this case the Court has called for security arbitrarily and without exercising its discretion properly. The appeal on this ground must therefore fail.

The second question is whether the learned Judge was right in holding that the sale in question was merely voidable and need not therefore be set aside automatically and whether in the circumstances there was no justification for the refusal to set it aside. The authorities in this Court are, in our opinion, strongly in favour of the decision of the learned Subordinate Judge. It was held by a Bench of this Court in *Ammukutty v. Manavikrama*¹, that although it was illegal to file a suit against a receiver appointed by a Court without obtaining the previous sanction of that Court such an illegality did not affect the jurisdiction of the Court in which the suit was laid but could be effectively cured by the plaintiff obtaining the sanction during the course of the litigation and this principle was approved by another Bench of this Court in *Kalyanasundaram v. Iyer Narasimha Aiyangar*². It will be noticed, of course, that these decisions did not deal specifically with any sales in execution. But the same principle has recently been extended by another Bench of this Court in *Venkatanarasimha Rayanimgar v. Venkatalinga Nayanim Bahadur*³, to such a sale in execution. The headnote of that case runs thus :

1. (1920) I.L.R. 43 Mad. 793.
2. (1922) 44 M.L.J. 427.

3. (1944) 1 M.L.J. 129.

"Where property in the possession of a receiver is sold in execution without obtaining leave of the Court, the sale is not void but is only voidable at the discretion of the Court. And where leave of the Court is obtained subsequently the illegality is effectively cured and the sale is not liable to be set aside."

There are no decisions to the contrary and if these decisions can be taken to govern the facts of this case, we are naturally bound by them.

It is argued by learned counsel for the appellant that the decisions do not govern the facts of this case, that the analogy between a suit and a sale in execution is not complete but rather misleading and that there are special facts which differentiate the decision in *Venkatanarasimha Rayanimgar v. Venkatalinga Nayanim Bahadur*¹ from the case now before us. On the question of the analogy between a suit and a sale we think the contention of the learned counsel is wrong. His argument is that the holding of a sale is equivalent to the decision of a suit and the confirmation of the sale is equivalent to an adjudication in an appeal; but we are unable to see the force of this contention. The decree in a suit may or may not be appealed against. It depends entirely upon the volition of the party against whom the decree has been passed. But the question of the confirmation of the sale must inevitably be decided by a Court after the interval laid down by the procedure Code. It seems to us that the analogy is far stronger between the holding of a sale and the filing of a plaint. When a plaint is filed the proceedings necessarily end at some time or other in the passing of a decree. When a sale is held the proceedings necessarily end at some time or other in the setting aside of the sale or in its confirmation. We think therefore that if the law is that an illegality can be cured by leave obtained during the pendency of the suit the same principle should rightly be extended to the case of a sale where, as in this case, the leave has been obtained before the sale has finally been confirmed. Whether therefore there is any distinction on facts between *Venkatanarasimha Rayanimgar v. Venkatalinga Nayanim Bahadur*¹ and the present case, we are of opinion that the general extension of the rule from suit to sale in execution is justified on a consideration of the nature of the two kinds of legal process. It is not necessary to consider the differences in fact which undoubtedly exist. In *Venkatanarasimha Rayanimgar v. Venkatalinga Nayanim Bahadur*¹ leave was in fact granted before the sale, although the question which arose was in some way complicated by the fact that when the leave was granted one receiver was in control of the property and when the sale was held he had been succeeded in office by another receiver. Without therefore deciding that the decision in *Venkatanarasimha Rayanimgar v. Venkatalinga Nayanim Bahadur*¹, is binding upon us, we hold that the view of the learned Subordinate Judge was right and that the sale was not void but only voidable. On the facts we see no reason at all why this voidable sale should be set aside. No injustice of any kind can be pointed out, apart from the allegations made under rule 90 which cannot now be considered to show why this sale should be set aside. We accordingly hold that the appeal fails on all points and must be dismissed with costs.

V.P.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

P. S. Vijayaranga Reddiar and others

.. *Petitioners**

v.

S. V. Muthuswami Reddiar

.. *Respondent.*

Criminal Procedure Code (V of 1898), sections 144, 195, 436 and 530—Complaint by Sub-Magistrate against petitioners for an offence punishable under section 188, Indian Penal Code, on the ground of violation of order passed by Sub-Magistrate under section 144—Order not to prevent breach of peace but to preserve evidence—Joint Magistrate's Order holding Sub-Magistrate's order to be without jurisdiction and directing withdrawal of complaint—Order directing withdrawal set aside in revision by District Magistrate—Order of District Magistrate incompetent.

The Sub-Magistrate of Radhapuram filed a complaint against the petitioners for an offence punishable under section 188, Indian Penal Code, the averment being that the petitioners had dis-

obeyed an order passed under section 144, Criminal Procedure Code. The latter order had been passed not so much to prevent a breach of the peace as to preserve the evidence that might be required in a suit that may have to be filed by the ryots with regard to a tank and its embankment and channels. The Joint Magistrate to whom appeals from the Sub-Magistrate lay held that the order of the Sub-Magistrate was without jurisdiction and *ab initio* void under section 530 of the Code and that the complaint should therefore be withdrawn. The District Magistrate set aside in revision the order of the Joint Magistrate directing the withdrawal of the complaint.

Held, (i) that the order of the Sub-Magistrate was *ultra vires* and without jurisdiction; and (ii) that the District Magistrate had no jurisdiction to direct the complaint to be proceeded with as (a) it was not an administrative act but a judicial act and (b) the order of the Joint Magistrate directing withdrawal of the complaint could not be said to be an order of discharge. All that the District Magistrate could do was to send up the papers to the High Court for orders under section 438 of the Code and not dispose of it himself.

Nagu Servai, In re, (1934) 67 M.L.J. 195 : I.L.R. 57 Mad. 1101, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate of Tinnevely dated 1st October, 1943, in Cr. R. C. No. 2 of 1943 (Proc. L. Dis. No. 5305 of 1943 on the file of the Court of the Joint Magistrate of Shermadevi) M. C. No. 2 of 1943, Sub-Magistrate's Court, Radhapuram.

K. S. Jayarama Aiyar and *S. Kothandarama Nainar* for Petitioners.

A. S. Sivakaminathan for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the order of the District Magistrate of Tinnevely in Criminal Revision Case No. 2 of 1943 on his file setting aside the order of the Joint Magistrate of Shermadevi in L. Dis. No. 5305 of 1943 on his file and directing the complaint to be proceeded with. A complaint was filed against the petitioners before this Court by the Second Class Magistrate of Radhapuram in the Court of the Second Class Magistrate, Nanguneri, for an offence punishable under section 188, Indian Penal Code. The complaint was presented under section 195, Criminal Procedure Code, and the averment was that these petitioners were guilty of having disobeyed an order passed under section 144, Criminal Procedure Code, in M.C. No. 2 of 1943 on the file of the Sub-Magistrate of Radhapuram. The Joint Magistrate of Shermadevi, to whom appeals from the decisions of the Sub-Magistrate of Radhapuram lie found that the Sub-Magistrate passed the order under section 144 without jurisdiction and it was therefore *ab initio* void under section 530 (1), Criminal Procedure Code. He also directed the complaint to be withdrawn. One Muthuswami Reddiar filed a criminal revision petition to revise the said order of the Joint Magistrate directing withdrawal of the complaint to the District Magistrate of Tinnevely who allowed it.

It is urged before me that the District Magistrate had no jurisdiction to direct the complaint to be proceeded with. It is urged however for the respondents that the complaint being one relating to an offence mentioned in section 195 (1) (a) of the Criminal Procedure Code, it is a complaint by a public servant and that under section 195 (5) the order of withdrawal must be considered to be one passed by the authority to which that public servant is subordinate and therefore it is purely an administrative order and that the order of the authority superior to the authority which passed the order must be considered to be an administrative act and therefore this petition to revise that order is not maintainable. But then it is clear from the order sought to be revised that it purported to be an order passed by the District Magistrate as a Court and the petition was treated as a revision petition. As a matter of fact, in *Nagu Servai*, In re¹, the nature of a petition filed under section 195 (5) had to be considered, and it was observed that the act of filing a complaint by the Magistrate was a judicial act and that an application to the District Magistrate to have the complaint withdrawn "was asking the District Magistrate to exercise his judicial discretion."

It is next urged that the District Magistrate had no jurisdiction under section 436 to set aside the order of the Joint Magistrate and that all that he could do was to send up the papers to this Court for orders under section 438 in case he considers the order to be incorrect. The order of the Joint Magistrate directing the withdrawal of the complaint cannot be said to be an order of discharge. Consequently, it will not be open to the District Magistrate to himself set it aside.

Therefore the next point for consideration is whether the order of the District Magistrate should be confirmed or set aside. As pointed out by the Joint Magistrate as well as by the Additional District Magistrate, the order passed under section 144 was *ultra vires* and without jurisdiction. It is also clear that the object of the Second Class Magistrate in having issued the order was not so much to prevent a breach of the peace as to preserve the evidence that might be required in a suit that may have to be filed by the ryots with regard to a tank and its embankment and channels. In these circumstances, it cannot be said that the Joint Magistrate was wrong in having considered that this is not a fit case in which the parties ought to be prosecuted.

I therefore set aside the order of the District Magistrate and restore the order of the Joint Magistrate.

V.P.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Gogineni Subbayya and another

.. *Appellants**

v.

Gogineni Govindamma

.. *Respondent.*

Maintenance—Suit for maintenance by wife—Compromise providing for parties living together and for future maintenance in case of separation later—Not opposed to public policy—Whether plea can be taken in execution proceedings.

A suit for maintenance by the wife was compromised, and it was agreed that the husband and wife should live together and in case of future disagreement between them the husband should pay a certain rate of maintenance to the wife. For some time after the compromise the parties lived together, but on account of subsequent disagreement the wife began to live separately and then took out execution of the compromise decree to have the properties charged brought to sale for the realisation of her maintenance. On the question whether the compromise decree was opposed to public policy and whether the plea could be taken in execution proceedings,

Held, that an agreement of settlement providing for future separation is not void where the agreement was one in furtherance of the husband and wife living together, and that the compromise in the present case being for the purpose of effecting a reconciliation between the parties who were living apart it could not be said that it was opposed to public policy merely because there was a contract for future separation.

Venkatakrishnayya v. Lakshamma, (1943) 2 M.L.J. 359; *Harrison v. Harrison*, (1910) 1 K.B. 35; *Meyrick v. Meyrick*, (1921) 1 Ch. 311 at 319, followed.

Krishna Iyer v. Balammal, (1910) I.L.R. 34 Mad. 398, distinguished.

Held further, that the plea that the compromise was opposed to public policy cannot be taken in execution proceedings as the case was not one of inherent want of jurisdiction, but one where the question of jurisdiction was to be decided by the Court itself, in which case, even if the decision of the Court recording the compromise was wrong the Court was nevertheless competent to give it and such decision will operate as *res judicata*.

Chinnappareddy v. Srinivasarao Garu, (1935) 69 M.L.J. 196 and *Lakshmanaswami Naidu v. Rangamma*, (1902) I.L.R. 26 Mad. 31, distinguished.

Appeals against the orders of the Court of the Subordinate Judge of Tenali dated 19th April, 1943, and made in A. S. Nos. 55 and 71 of 1943 respectively preferred against the orders of the Court of the District Munsiff of Repalle dated 18th January, 1943, and made in E. P. No. 130 of 1942 and dated 30th November, 1940, and made in E. P. No. 245 of 1940, respectively in O. S. No. 658 of 1930 on the file of the District Munsiff's Court of Tenali.

A. Lakshmayya for Appellants.

V. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—The appellants in both these appeals are the judgment-debtors in O. S. No. 658 of 1930 on the file of the Court of the District Munsiff of Tenali and the appeals arise out of proceedings in execution of that decree. That was a suit filed for maintenance by the wife against her husband and his brother who was the alienee from the husband in respect of the properties over which a charge was sought to be fastened for the maintenance claimed in the suit. The suit ended in a compromise and a decree was passed on the 14th February, 1933, under which it was agreed that the husband and wife should live together and that in case of any disagreement between them the husband should pay a certain rate of maintenance to the wife. After the compromise they lived together for about four years and on account of subsequent disagreement the wife began to live separately. She took out execution in E. P. No. 245 of 1940 and sought to have the charged properties brought for sale for the realisation of the maintenance due to her. The husband retaliated by filing a suit No. 55 of 1939, for restitution of conjugal rights and obtained a decree therein on the 19th August, 1940. On an objection taken by the husband that the decree in O. S. No. 55 of 1939 was a bar to the execution petition, the trial Judge upheld the objection and dismissed E. P. No. 245 of 1940. The wife thereupon filed an appeal, No. 23 of 1941, on the file of the Court of the Subordinate Judge of Tenali against the decree in the suit for restitution of conjugal rights and the appeal was allowed. The matter was taken to this Court in S. A. No. 1183 of 1942 and it was dismissed on the 16th October, 1942. In the meanwhile the wife filed an appeal, No. 71 of 1943, on the file of the Court of the Subordinate Judge of Tenali against the order dismissing E. P. No. 245 of 1940. After the appeal against the decree in the suit for restitution of conjugal rights was allowed, the wife filed another execution petition No. 130 of 1942, praying that it might be treated as a continuation of E. P. No. 245 of 1940 and for sale of the charged properties. The judgment-debtors contested that execution petition, their objections were overruled and the sale was directed. Against that order also, the judgment-debtors filed an appeal, No. 55 of 1943, on the file of the Court of the Subordinate Judge of Tenali. The contention of the husband was that the terms of the compromise were opposed to public policy and therefore not valid and that the compromise decree could not therefore be executed against the judgment-debtors. Appeal No. 55 was dismissed and Appeal No. 71 of 1943 was allowed with costs, the learned Subordinate Judge holding that the compromise was not invalid as being opposed to public policy and that the wife was entitled to proceed against the properties. It is as against the order in these two appeals that these two civil miscellaneous second appeals have been filed.

The main questions for consideration in these appeals are (1) whether the compromise decree is invalid as being opposed to public policy and could not be executed and (2) whether it is open to the respondents to raise this plea in execution proceedings.

Point No. 2 : It is contended for the respondent that, under the provisions of Order 23, rule 3, of the Civil Procedure Code, the Court before it records a compromise must inquire into the question as to whether the compromise it is asked to record is a lawful one or not and therefore the Court in this case when it passed a decree in terms of the compromise must be considered to have decided that it was a lawful one and that consequently the executing Court cannot go behind the decree and hold that the agreement was not lawful and that the decision of the Court directing the recording of the compromise would operate as *res judicata* and that it will not be open to the judgment-debtors who were parties to the suit to contend that the agreement was unlawful as opposed to public policy. This is not a case in which the decree is impugned as being invalid on the ground that the Court which passed it had no inherent jurisdiction. What is contended is that if the order recording the compromise and passing a decree in terms of the compromise must be taken to have impliedly decided that the agreement was lawful, that decision would be valid and binding as between the parties to the suit and therefore the judgment-

debtors could not dispute it. In *Chinnappareddi v. Srinivasarao Garu*¹, it was pointed out by a Bench of this Court that there was a distinction between an inherent want of jurisdiction in a Court and a want of jurisdiction on grounds which have to be determined by the Court itself and that in the latter case even if the decision was wrong the Court was nonetheless competent to give it and that the decision will operate as *res judicata*. But in *Lakshmanaswami Naidu v. Rangamma*², the question had to be considered by another Bench of this Court as to whether execution of a compromise decree embodying an agreement which was unlawful could be resisted on the ground that the agreement was unlawful as being opposed to public policy and their Lordships held that such a plea could be raised. This is what is stated at page 33,

"We think the appeal is well founded. There is no contention but that the sale of such an office as that now in question is opposed to public policy and ought not to be recognised or enforced by the Courts. (See *Rajaram v. Ganesh*³.)

It is, however, contended that, as a decree has been passed directing the sale of the office, the Court executing the decree is not at liberty to consider its validity, but must execute it according to its terms. We cannot admit the soundness of such a contention. In the case of *Nagappa v. Venkatarau*⁴ it was pointed out that when a decree is based on an agreement of compromise and when there is nothing more on the part of the Court than a mere adoption of the contract the Court must be taken to adopt the contract with all its incidents. Under section 375 of the Civil Procedure Code, the Court had no jurisdiction to pass a decree on a compromise unless it was a 'lawful' compromise.

Any terms of a contract which are opposed to public policy are invalid and will not be enforced by the Courts. So far as the decree embodied unlawful terms of a compromise it is inoperative and will not be enforced."

This is no doubt a decision on the point in question, but then the decision was given on the basis that the Court has no jurisdiction to pass a decree on a compromise which is unlawful. The question as to whether a compromise is lawful or not is a question which the Court recording the compromise was competent to decide and from the mere fact that it decided it was lawful, without deciding which it could not record the compromise, it could not be said that the Court had no jurisdiction to pass such an order. If the distinction sought to be drawn between the two classes of objections to jurisdiction referred to in *Chinnappareddi v. Srinivasarao Garu*¹ is borne in mind then it will be a wrong decision and not a decision made by a Court without jurisdiction and such a decision will operate as *res judicata*. Consequently, following the later decision in *Chinnappareddi v. Srinivasarao Garu*¹, I find that the executing Court is barred by *res judicata* from contesting the lawful character of the agreement.

Now coming to point No. 1, what is urged for the appellant is that the agreement between the husband and wife as to future separation was opposed to public policy and that therefore it was invalid. It is no doubt true that it has been held by Courts both in India and in England that an agreement of settlement providing for future separation is void as being contrary to public policy. But this is not a universal rule and there are several exceptions to this which depend upon the attendant circumstances. As pointed out in Halsbury's Laws of England, Second Edition, Volume 16, at page 716 :

"an agreement made on a reconciliation, the object of which is to put an end to an existing separation, is not, however, void merely because it contemplates and provides for the possibility that the parties will again become separated."

And at page 717 in the second paragraph of 1166, it is stated :

"An agreement for separation will always be presumed to be legal until the contrary is proved, the burden of proving illegality lying on the person alleging it."

It is urged for the respondent that on the facts of this case the agreement in question, though the agreement contemplated future separation, is not illegal or opposed to public policy. On the contrary, it is urged that it was in the interests of the marital relationship of the parties and therefore could not be construed to be one opposed to public policy. The agreement was entered into in a suit for maintenance. The parties, at the time when the suit was filed, were living

1. (1935) 69 M.L.J. 196 : I.L.R. 59 Mad. 62.

2. (1902) I.L.R. 26 Mad. 31.

3. (1898) I.L.R. 23 Bom. 131.

4. (1900) I.L.R. 24 Mad. 265.

separately, and the wife was claiming separate maintenance. That state of relationship between the parties, namely, that of living separately was sought to be put an end to, a reconciliation was effected, and the husband and wife agreed to live together and they lived together for some years. It was possible to get such a reconciliation only by providing for the payment of maintenance in case there should be disagreement between them in the future. It cannot therefore be said that this is not a case in which the motive for the compromise was to effect a reconciliation between the parties. The agreement was hence one in furtherance of the husband and wife living together. Consequently a clause in such an agreement providing for payment of maintenance in case they happened to live separately in future cannot be said to be opposed to public policy. In a very nearly similar case *Venkatakrishnayya v. Lakshamma*¹, it was held by this Court that a similar agreement was not invalid as opposed to public policy. In that case the wife had obtained a decree for maintenance against her husband. During the course of the appeal against that decree, there was a compromise under which it was agreed that the plaintiff should be paid a certain sum as arrears of maintenance and it also provided how much should be paid in future. It was also agreed that the husband should take the wife to his house and they should live as husband and wife for one year during which period the maintenance decree was not to be enforced, and if the defendant refused to maintain her or otherwise treated her with neglect during that period of one year the decree could be executed at the end of one year. The wife accordingly lived with the husband for a few months and then left him and sought to execute the decree. It was contended that the decree could not be enforced as being opposed to public policy. It was pointed out by my learned brother, Horwill, J., that the general purport of the compromise seemed to be that the wife was willing to suspend the operation of her decree for a period of one year in order to give her husband an opportunity of proving that he was willing to maintain her properly without cruelty or neglect. He was further of opinion that far from being opposed to public policy it seemed to be in the interests of family life that the wife should be willing to forego her right to maintenance for a while in order that the husband should have one more opportunity of showing that he was fit to live with. In this case also the object of the parties in entering into a compromise was to give the parties a chance of living amicably and they did live so. It is this circumstance that renders such agreements as not being opposed to public policy. As a matter of fact, an agreement made on reconciliation between husband and wife, when it contains a term as regards future separation, was considered to be not opposed to public policy on the ground that it was made on reconciliation—vide *Harrison v. Harrison*² and *In re Meyrick's Settlement; Meyrick v. Meyrick*³. It is true that in *Krishna Aiyar v. Balammal*⁴, a Bench of this Court held that an agreement between husband and wife to live apart from each other was invalid. But then that was not a case in which there was any attempt at reconciliation. There the husband and wife were living together as man and wife for about 15 years. The wife obtained an order from a Deputy Magistrate for maintenance of Rs. 5 a month. The plaintiff thereupon filed a suit for restitution of conjugal rights and a compromise was effected. Under the terms of that compromise the defendant was to go and live with the husband and if afterwards they separated the plaintiff should pay the defendant Rs. 350 in full satisfaction of her claim for maintenance, and an agreement was accordingly executed and the suit for restitution was withdrawn; but the wife did not go and live with the husband or return to his protection but instead filed a suit for recovery of Rs. 350 as per the agreement. The suit was dismissed. The husband thereupon filed a suit for restitution of conjugal rights. It was held by this Court that the subsequent agreement about separation was not a bar to the suit for restitution of conjugal rights. Now the circumstances in that case clearly indicated that there was no real intention at reconciliation and as a matter

1. (1943) 2 M.L.J. 359.

2. (1910) 1 K.B. 35.

3. (1921) 1 Ch. 311 at 319.

4. (1910) I.L.R. 34 Mad. 398.

of fact there was no reconciliation in fact. On this ground the facts of this case are distinguishable from the facts in *Krishna Aiyar v. Balammal*¹. As a matter of fact, that decision was quoted before my learned brother Horwill, J., in *Venkatakrishnayya v. Lakshamma*² and he also pointed out that the facts of that case had little resemblance to the contract under consideration before him which was similar to the one before us in this case. Other High Courts have held that such contracts for future separation are not invalid. Vide *Mohamed Muniuddin v. Jamal Fatima*³ and *Muham-mad Ali Akbar v. Mst. Fatima Begam*⁴, which have dissented from the view expressed in *Bai Fatima v. Ali Mahomed Ayeub*⁵.

I therefore consider that in view of the fact that the agreement was for the purpose of effecting a reconciliation between the couple who were living apart, it could not be said to be one in contravention of public policy, merely because there was a contract for future separation. Following the decision of my learned brother Horwill, J., in *Venkatakrishnayya v. Lakshamma*², I find that the compromise was not illegal.

The appeals fail and are accordingly dismissed with costs. Advocate's fee one set.

Leave refused.

V.P.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE BELL.

Krishna Ayyar

.. Appellant*

v.

Gomathi Ammal and others

.. Respondents.

Indian Limitation Act (IX of 1908), Article 118—Suit by reverter to set aside decree upholding adoption—Allegation of fraud against nearest reversioner in agreeing to a compromise resulting in such decree—Maintainability—Limitation.

The sister's son of one S sued for a declaration that the adoption by the widow of S of the 2nd defendant, was untrue in fact and in any case invalid. The factum and validity of the adoption were in issue in a previous suit, brought by the plaintiff's mother and that suit had been dismissed as the result of a compromise. Alleging that the compromise which resulted in that decree was due to fraud between the nearest reversioner and the adopted son, the plaintiff claimed that the present suit was within time and that it was brought within three years of his attaining majority.

Held, that there is an inherent right of action to any person who can prove that a decree which would otherwise bind him cannot be held to bind him on the ground that it was obtained by fraud; hence though Article 118 of the Limitation Act gives a right which is strictly limited to a period of 6 years to the then representative of the reversion to obtain a declaration that a particular adoption is untrue or invalid, nothing therein can deprive a reversioner's right of action based upon the fraud between the person claiming to be the adopted son and the nearest reversioner and that the present suit was maintainable and brought within time under the provisions of Article 95 of the Limitation Act.

Chiruvolu Ponnammam v. Chiruvolu Perraju, (1906) 16 M.L.J. 307 : I.L.R. 29 Mad. 390 ; *Aramma v. Gopaladasaya*, (1918) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.) ; *Kesho Prasad Singh v. Sheo Prasad Ojha*, (1924) 47 M.L.J. 824 : L.R. 51 A.A. 381 : I.L.R. 46 All. 831 (P.C.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevely in O. S. No. 27 of 1941, etc.

A. Swaminatha Aiyar and S. Tyagaraja Aiyar for Appellant.

K. R. Rangaswami Aiyangar, V. Meenakshisundaram and S. V. Rama Aiyangar for Respondents.

The Judgment of the Court was delivered by

King, J.—This appeal arises out of a suit brought by the plaintiff in the Court of the learned Subordinate Judge of Tinnevely with the main purpose of obtaining a declaration that the adoption of the second defendant is untrue in fact and, in any case, invalid. The plaintiff is the son of the sister of one Sundaram Ayyar,

1. (1910) I.L.R. 34 Mad. 998.

2. (1943) 2 M.L.J. 359.

3. (1921) I.L.R. 43 All. 650.

4. (1929) I.L.R. 11 Lah. 85.

5. (1912) I.L.R. 37 Bom. 280.

* Appeal Nos. 458 of 1942 and C. M. P. No. 3058 of 1944.

2nd August, 1944.

not contested that reckoning from the date which the plaintiff himself gives of his own birth, this suit by him, if it be maintainable at all, was brought within time under the provisions of article 95. The learned Judge in disposing of the suit appears to us to have lost sight altogether of that part of plaintiff's case which depends upon the alleged fraudulent action of the second defendant and the plaintiff's mother, the sixth defendant, though, as we shall indicate presently plaintiff himself was probably most to blame for that fact. We hold that the present suit is maintainable and is maintainable upon the facts alleged in the plaint, as originally filed by the plaintiff.

We are of opinion, however, that the plaint nonetheless requires amendment. We notice that in the plaint as originally presented to the Court, the plaintiff in formulating his reliefs in paragraph 22 merely states that the withdrawal of the suit in 1931 by the sixth defendant is not binding on him, and asks as his main relief that he shall have a declaration that the alleged adoption of the second defendant is untrue and invalid. It is no wonder on this manner of formulating his reliefs that the Court has been misled into regarding this suit as primarily and even exclusively one for a declaration against the alleged adoption of the second defendant.

The plaintiff has now filed an application to amend the plaint, the amendment being confined to paragraph 22 and he has now stated that he wishes to ask for the following reliefs :

(1) That the dismissal of the suit of 1931 be set aside, that the razinamah entered into in the said suit be declared not binding upon the plaintiff and the reversionary heirs entitled to succeed to the estate of the late Sundaram Ayyar,

(2) that the suit be revived and the trial be permitted to be conducted by the present plaintiff, by substituting him in the place of his mother, and

(3) that a declaration be given that the second defendant was never in fact adopted by the first defendant, and at any rate, that any such adoption was invalid.

A formal objection has been filed on behalf of the defendants to the amendment of this plaint. But, in view of the conclusions at which we have arrived and which have been embodied in this judgment, we must permit the amendment to be made.

The only serious objection, in our opinion, amongst those raised by the respondents is one dependent upon the law of limitation. This objection, in our opinion, has no force, because, although paragraph 22 has now been amended, the facts upon which the reliefs as now formulated in paragraph 22 are claimed, were already part of the plaint when it was first presented. There can be no question, therefore, that it is only at this stage that the plaintiff is putting forward a new case against the defendants. The suit will now be remanded to the learned Subordinate Judge for further disposal according to law. The defendants will of course be permitted to file additional written statements. But in so far as these additional written statements may contain any contention that even after the plaint has been amended the suit is not maintainable, the learned Subordinate Judge will clearly understand that it is now finally decided by this Court that the suit is maintainable upon the amended plaint.

We have already indicated that the blame for the disposal of the suit in the way in which it has been disposed of by the learned Judge rests mainly upon the plaintiff himself, and the manner in which he has drafted his plaint, and in all probability on the manner in which he, like his opponents confined his arguments to the question of limitation. There is nothing to show that he protested against the request of the vakils for the defendants to take the eighth issue as a preliminary issue in the case, and we must conclude that the absence in the judgment of the learned Judge of all reference to any cause of action derivable from the allegations of fraud in the plaint was due to the fact that the matter was never pressed before him.

In these circumstances we see no reason to interfere with the decision of the learned Judge that the costs of the suit be payable by the plaintiff, those costs of course now being confined to the costs incurred upto the time of the learned Judge's judgment. With regard to this appeal, we consider the most appropriate order to be passed is that the respondents be not called upon to pay the appellants costs,

but that costs of both sides be costs in the cause. The court-fee paid on the memorandum of appeal will be refunded to the appellant.

V.P.S.

Suit remanded.

[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD MACMILLAN, LORD CLAUSON AND SIR GEORGE RANKIN.

Bai Shevantibai

*Appellant**

v.

Janardhan Raghunath Warick and others

Respondents.

Civil Procedure Code (V of 1908), section 110—Second paragraph—Suit by assignee of purchaser of a share of joint family property for partition—Claim negatived as barred by limitation—Appsal—Does not involve question respecting whole of the joint family property—Privy Council practice—Special leave—Reservation of liberty to respondent to object to granting of leave at the time of hearing—Separate petition to rescind leave, not necessary.

A question as to the title of the plaintiff, (an assignee of a purchaser of a share in joint Hindu family property), to the share which he claims to have partitioned and allotted to him in the joint family property cannot become a question respecting the whole of the joint family estate merely because if his title is established it will result in the joint family estate being partitioned. Where such a claim is negatived as barred by limitation, the decree does not involve "directly or indirectly some claim or question to or respecting" the joint family property as a whole. The value of the subject-matter in dispute in an appeal to the Privy Council in such a case must be taken to be the value of the share of the joint family property in respect of which the claim is made in appeal. Hence where the value of the share claimed by the plaintiff is not more than Rs. 3,000, leave to appeal to Privy Council cannot be granted under the second paragraph of section 110, Civil Procedure Code, even though the total value of the joint family property may exceed Rs. 10,000.

Where at the time of granting of the special leave to appeal to His Majesty in Council, liberty has been reserved to the respondent to contend at the time of the hearing that such leave ought not to have been granted, no separate petition to rescind the leave is necessary if the respondent's objection is upheld.

Sir T. Strangman K. C. and A. G. P. Pullan for Appellant.

G. S. Rewcastle K. C. and S. P. Khambatta for Respondents.

• Their Lordships' Judgment was delivered by

• LORD CLAUSON.—In the suit which gives rise to the present appeal the appellant as assignee of the purchaser from a member of a joint family of one sixth share in the joint family property, sued for partition of the family property and to have her one sixth share allotted to her. She also sought, as assignee of a mortgage on another sixth share, to have her mortgage enforced; but this part of the suit resulted in a decree in the present appellant's favour for a trifling sum and the only question raised in regard to this part of the case relates to a question of costs. The question remaining in controversy is whether the appellant's claim is barred by the law of limitation. The value of the interest which the appellant claims is well under Rs. 10,000, probably about Rs. 3,000. The total value of the joint family property exceeds Rs. 10,000. There is no controversy as to the identity or extent of the family property, or as to the right of partition to which the appellant would be entitled if the law of limitation were not a bar to her claim. In the Court of first instance, the claim was held to be barred by the law of limitation and the suit, so far as it related to the claim for partition, was dismissed. On appeal to the appellate Court that Court dismissed the appeal as well on the question of the present appellant's claim to partition, as also on the question of costs. The appellant in due course applied to the appellate Court for the usual certificate for leave to appeal to His Majesty in Council. The power of the appellate Court to grant the necessary certificate turned upon the true construction, in its application to the present case, of section 110, Civil Procedure Code, which is as follows :—

" 110. In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be that sum or upwards,

"or the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value,

"and when the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

The appellate Court took the view that there was no question in this case of such a character as to make it a fit case for the grant of a certificate under section 109 (c), and dismissed the application on the ground that, the share of the appellant in the property of which she sought partition being less in value than Rs. 10,000, the subject-matter of the appeal was below the minimum value required by section 110. The present appellant thereupon petitioned His Majesty in Council for special leave to appeal and leave was so granted but upon the terms that liberty should be reserved to the respondents to contend that such leave to appeal ought not in the circumstances of the case to have been granted. Upon the appeal coming before their Lordships, the respondents in exercise of the liberty so reserved, contended, by way of preliminary point, that leave to appeal ought not in the circumstances of the case to have been granted. They contended that the High Court had correctly taken as the "value of the subject-matter in dispute on appeal" the value of the interest claimed by appellant. They pointed out that this view of the matter accorded with that taken by the Bombay High Court in *De Silva v. De Silva*¹ followed by the same High Court in *Raoji Bikaji v. Laxmibai*² and in *Nariman Rustonji Mehta v. Hasham Ismayal*³. The appellant based the contention that the High Court had wrongly refused to grant a certificate on the second clause in section 110, and argued that the decree in the present case involved directly or indirectly a question respecting the whole of the joint family property, admittedly of a value exceeding Rs. 10,000. They referred to the decision of the Calcutta High Court in *Lala Bhugwat Sahay v. Rai Pashupati Nath Bose*⁴ and to the decision of the Allahabad High Court in *Muhammad Asghar v. Abida Begum*⁵.

Their Lordships are satisfied that the appellate Court were correct in holding that the value of the subject-matter in dispute on appeal to His Majesty in Council must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming, and indeed this view was not disputed before their Lordships' Board. A further question, however, remains namely whether the decree refusing partition on the ground that the claim is barred by the law of limitation "involves directly or indirectly some claim or question to or respecting" the joint family property as a whole. Their Lordships do not find it necessary to decide whether the words of clause (2) in section 110 can on their true construction ever refer to any property but that outside the suit. It is enough for the purposes of the present case to say that their Lordships feel no doubt that a question as to the title of the plaintiff to the share which he claims in the joint property does not become a question respecting the whole of the joint family estate merely because, if his title is established, it will result in the joint family estate being partitioned. Their Lordships are thus of opinion that the High Court were right in refusing to grant the certificate and that accordingly the appellant was not justified in asking this Board for special leave to appeal. The contention which the respondents were by the Order in Council of the 7th March, 1940, given liberty to bring forward thus succeeds. In accordance with their Lordships' practice in analogous cases: (see *Zahid Husain v. Mohammad Ismail*⁶ and *Mukhlal Singh v. Kishuni Singh*⁷) no petition to rescind the leave to appeal will be required. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will be ordered to pay the costs of respondents 8 and 9, who alone appeared.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondents 8 and 9: *Hy. S. L. Polak & Co.*

V.S.

Appeal dismissed.

1. (1904) 6 Bom.L.R. 403.

2. (1920) I.L.R. 44 Bom. 104.

3. (1925) I.L.R. 49 Bom. 149.

4. (1906) 10 C.W.N. 564.

5. (1933) I.L.R. 54 All. 858.

6. (1930) 59 M.L.J. 10 : L.R. 57 I.A. 186 : I.L.R. 52 All. 277 (P.C.).

7. (1931) 59 M.L.J. 444 : L.R. 57 I.A. 279 : I.L.R. 10 Pat. 86 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Arulayi

v.

Antonimuthu Nadan and others

.. Appellant*

.. Respondents.

Succession Act (XXXIX of 1925), section 33-A (5) (b)—Construction—Does not govern the classes mentioned in clause (a) of the sub-section—Appellate Court—Limits to powers of—Plaintiff claiming certain sum out of assets left by a deceased—Court-fee paid on that sum—Decree for that sum and also decree for similar sums in favour of some defendants—Appeal by one of the defendants—Plaintiff and other defendants neither appealing nor filing memorandum of objections—Appellate Court cannot give the plaintiff or the other defendants decrees for sums in excess of those claimed or decreed.

The expression "unless the deceased dies intestate in respect of all his property" occurring in clause (b) of sub-section (5) of section 33-A, Succession Act cannot be construed as part of clause (a) of the sub-section and as governing the three classes mentioned in clause (a). It is put in as a separate and independent clause and is not made part of clause (a) and as such must be so construed.

The plaintiff claimed a certain sum out of the assets left by a deceased and paid court-fee on that sum. The sum was decreed and similar sums were decreed in favour of some of the defendants also. One of the defendants appealed. Neither the plaintiff nor the other defendants cared to file an appeal or memorandum of objections against the decree. The appellate Court gave the plaintiff and other defendants decrees for increased sums. On second appeal,

Held, that the lower appellate Court clearly erred in giving the plaintiff a decree for a sum in excess of that upon which court-fee was paid. Nor was there any justification for the appellate Court to have interfered in favour of the non-appealing defendants.

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga in A. S. No. 14 of 1942, preferred against the decree of the Court of the District Munsiff, Sivaganga in O. S. No. 68 of 1940.

K. Umanaheswaram for Appellant.

M. S. Venkatarama Aiyar for 1st Respondent.

The Court delivered the following

JUDGMENT.—The main question arising for decision in this second appeal is whether the provisions of section 33-A (1) of Act XXXIX of 1925, the Indian Succession Act apply to this case so as to benefit the appellant to the extent of property worth Rs. 5,000.

The appellant is the widow of one Arulandu Nadan who was an Indian Christian. He died in the year 1936, leaving his widow the first defendant, a sister the plaintiff, a brother the second defendant and two daughters by a deceased sister, defendants 3 and 4. The property left by the deceased Arulandu Nadan is stated in the plaint to be worth Rs. 6,725-14-0. The plaintiff conceded that the first defendant was entitled exclusively to Rs. 5,000 and interest thereon. Deducting this sum she claimed a sixth in the balance and that was mentioned to be Rs. 159-13-10³/₄. It was also stated that defendants 3 and 4 who were her sister's daughters were entitled to a like sum of Rs. 159-13-10³/₄. The second defendant was stated to be also entitled to a similar sum and the balance of the excess was stated to be the share of the first defendant, *i.e.*, this is in addition to the sum of Rs. 5,000 and interest thereon which was conceded in favour of the first defendant. Defendants 3 and 4 submitted to a decree apparently content with the share allotted to them in the plaint. The first defendant did not contest the plaintiff's claim. The second defendant, however, put forward a claim that he was entitled to a sixth not merely in the surplus remaining after setting apart Rs. 5,000 and interest for the sole benefit of the first defendant but in the entire assets left by Arulandu Nadan. To this claim the first defendant naturally took objection. The fight was between the first defendant whose priority to the sum of Rs. 5,000 and interest was conceded by the plaintiff and the second defendant who did not concede this right. The trial Court held in favour of the first defendant the widow and decreed Rs. 159-13-10³/₄ to each of the three sets of claimants, namely, the plaintiff, the second defendant and defendants 3 and 4. The plaintiff was content as she got what she wanted in her plaint, that being the amount on which she paid the court-fee. Defendants 3

and 4 did not file any appeal; they were also apparently content with what they got. Second defendant, however, took the matter on appeal to the appellate Court. That Court agreed with his contention and held that he was entitled to a sixth share in the entire property and did not uphold the exclusive right to Rs. 5,000 and interest put forward by the first defendant. While allowing the appeal, the appellate Court varied the decree in favour of the plaintiff and defendants 3 and 4 by giving a sixth share in the whole of the property to them. The first defendant has filed this appeal and urges that the correct view of the law is the one taken by the trial Court and that, at any rate, the appellate Court should not have varied the decree which had been passed in favour of the plaintiff and defendants 3 and 4.

Mr. Umamaheswaram urges that the plaintiff claimed in her plaint only Rs. 159 and odd, paid court-fee only on that sum, did not ask for an amendment of the plaint even after the first defendant appeared and put forward a larger claim and that after the decree of the trial Court, she did not prefer an appeal or even a memorandum of objections as she would be entitled to file as a respondent under Order 41, rule 22, Civil Procedure Code. Under that rule one respondent can file a memorandum of objections against another respondent and not merely against the appellant. That being so, it is said that there was no valid ground for the appellate Court enhancing the amount granted to the plaintiff and for varying a decree in which she acquiesced.

Section 33-A was introduced into the Succession Act by Act XL of 1926. Arulandu Nadan died in 1936. So the amending Act applies to this case. Under section 33-A (1) where the intestate has left a widow but no lineal descendants and the net value of his property does not exceed five thousand rupees, the whole of his property shall belong to his widow. Under clause (2), where the net value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of the five thousand rupees, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment. Clause 3 says :

"The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees, with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of section 33, as if it (residue) were the whole of such intestate's property."

Clause (4) is not material. Clause (5) which has given rise to the trouble runs as follows :

"This section shall not apply—

(a) to the property of :—

(i) any Indian Christian,

(ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or

(iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under section 24 of the Special Marriage Act, 1872, regulated by the provisions of this Act ;

(b) unless the deceased dies intestate in respect of all his property."

The contention put forward by the appellant which found acceptance in the trial Court is that the expression "unless the deceased dies intestate in respect of all his property" occurring in clause (b) is really part of clause (a) and governs the three classes which are mentioned in clause (a). According to the learned advocate, the section will not apply to the property of an Indian Christian unless the deceased died intestate in respect of his property, similarly as regards the persons mentioned in clauses (ii) and (iii). If this is the correct construction, then the provisions of clause (5) which provide that the section shall not apply to certain cases will exclude only those cases of Indian Christians who die leaving a will in respect of any sum or all his properties. But if the Indian Christian died intestate in respect of all his property, then the provisions in clause (5) will not come into operation and therefore the right of exclusion enacted in clause (5) would not apply.

This construction ignores the fact that the expression "unless the deceased dies intestate in respect of all his property" is put in as a separate and independent clause and it is not made part of clause (a). If the Legislature intended that it should be a clause governing the three classes of cases mentioned in clause (a), then it ought not to have been put as clause (b) at all, it should be put in continuation of sub-clauses (i), (ii) and (iii) of clause (a). If this construction is correct, then in the case of persons who are not Indian Christians or any other persons mentioned in clauses (ii) and (iii) of sub-clause (a) of clause (5), the section will apply whether the deceased died intestate in respect of all his property or whether he left a will disposing of some of his property. If an Anglo Indian or an Englishman domiciled in India or any of the other persons to whom Chapter II would apply other than those mentioned in clauses (i), (ii) and (iii) of clause (5) (a) leaves a will which does not dispose of his property, and who is therefore to be deemed to be intestate with respect to the property of which there was no testamentary disposition which was capable of taking effect, the provisions of section 33-A (i) would apply because clause 5 (b) only qualifies clause (5) (a) (i), (ii) and (iii) and is not an independent clause. In this connection the preamble to the amending Act is very helpful. The preamble states :

"Whereas it is expedient to amend the provisions of section 33 of the Indian Succession Act, 1925, so as to provide more liberally for the surviving widow or husband where there are no lineal descendants in the case of a total intestacy ; It is hereby enacted as follows :"

As stated on page 40 of Maxwell's Interpretation of Statutes—

"The preamble of a Statute has been said to be a good means of finding out its meaning and, as it were, a key to the understanding of it ; and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt."

Of course the preamble cannot be used in order to control the plain meaning or provisions of the enacting part. In this case, as the preamble states, the amending Act was passed to provide for a liberal provision in the case of the widow or the husband of the person where there are no lineal descendants "in the case of a total intestacy." For these reasons, I hold that the construction placed upon the preamble by the lower appellate Court is correct and I do not accept this argument of the learned advocate for the appellant. As Mr. Venkatarama Iyer, the learned advocate for the respondents has suggested, it may be that the Legislature thought that if a person set about making a will, he might well have made a provision if he wanted to benefit his widow and if he did not provide for his widow at all or sufficiently well, the Legislature might well have thought that that was not a case in which the Legislature ought to interfere by way of giving this preferential right to the widow. In a case where a person dies intestate, the Legislature might make a provision for the widow, but where the husband has left a will not making a sufficient provision or any provision in favour of the widow, that is an indication that he does not want her to benefit and that might be the reason why the condition of a total intestacy is mentioned in the preamble of the amending Act.

The next argument is that the sister and the sister's children are not entitled to anything more than a sixth in the surplus which alone the plaintiff claimed. The plaintiff did not claim anything more than Rs. 159 and odd and paid court-fee only on that sum. She got a decree for that sum and was content with it. Even after she got notice of the appeal filed by the second defendant, she did not choose to come up by way of an independent appeal or if the time for an independent appeal had elapsed by a memorandum of objections. Under these circumstances, the lower appellate Court clearly erred in giving the plaintiff a decree for a sum in excess of that upon which she paid court-fee. Even in the case of defendants 3 and 4, they were content apparently with the sum that was stated in the plaint to belong to them. As in the case of the plaintiff, they did not file an appeal or a memorandum of objection and there is no justification for the appellate Court to have interfered in their favour either.

Another contention was raised by the learned advocate for the appellant that the second defendant is precluded from setting up a claim to a half of the whole by virtue of certain proceedings that took place in O. S. No. 78 of 1934, District Munsiff's Court, Sivaganga. That was a suit which was filed by the deceased Arulandu Nadan who died during the pendency of that suit, and the brother applied in I. A. No. 232 of 1932 to be brought on record along with the widow as a legal representative. The widow contested this claim and stated that the whole of the property was not worth more than three thousand rupees and that therefore she was entitled under section 33-A of the Succession Act to the whole of the property. The Court evidently put a question to the counsel appearing for the widow whether in the event of the property being found ultimately to be worth more than Rs. 5,000, the brother would not have a share. That could not but be conceded and it was so done. Evidently in order to avoid a decision on the question which has been agitated in this Court for several hours, the District Munsiff appointed a Commissioner to fix the valuation of the estate left by the deceased Arulandu Nadan. Evidently the view was that in case the property was found to be worth more than Rs. 5,000, the brother would be admittedly entitled to a share and would therefore be entitled to come in as a legal representative along with the widow. The Commissioner found that the property was worth over Rs. 6,000. Objection was filed, the Court considered the objection and found that the property was worth over Rs. 6,000 and it accordingly brought the brother as one of the legal representatives. I fail to see how there is any decision against the brother in these proceedings which can be made the foundation for the argument now advanced before me. Mr. Umamaheswaram urges that there is an implied decision that in case the property was worth below Rs. 5,000, the brother would not be entitled to a share in it. I do not agree. There is no concession by the brother that in case the property was worth below Rs. 5,000, he would not be entitled to any share in it; nor is there any such finding by the Court. I therefore decline to accept this argument.

In the result, the second appeal is dismissed as against the first respondent with his costs payable by the appellant. As regards respondents 2 to 4, the appeal is allowed, the decree of the lower appellate Court as regards them is set aside and that of the trial Court restored; the balance will go to the appellant. There will be no order as to costs against respondents 2, 3 and 4. (No leave.)

V.S. ———— *Appeal allowed against respondents 2 to 4.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Kurma Pullamma

.. *Petitioner **

v.

Kurma Thatalingam *alias* Raju

.. *Respondent.*

Criminal Procedure Code (V of 1898), section 488—Application by wife for maintenance—Refusal—Grounds—Absence of neglect or cruelty—Fact of husband's marrying a second wife—Offer to take back first wife.

In an application by the wife for maintenance under section 488, Criminal Procedure Code, it was found by the Magistrate that there was no cruelty or neglect on the part of the husband, and that it was only incompatibility of temperament which prevented the wife from living with her husband's parents that resulted in her leaving his house. It was further shown that after waiting for some years the husband had married a second wife, and although he offered to take back the petitioner she refused to live with him.

Held, that under the circumstances the wife was not entitled to an order for maintenance as against the husband.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Amalapuram, dated 30th October, 1943, and passed in M.C. No. 18 of 1943.

T. V. Ramanatha Aiyar and V. Viyyanna for Petitioner.

Respondent not represented.

The Court made the following

ORDER.—This is a petition by the wife against the order dismissing her petition filed under section 488 of the Criminal Procedure Code. The Magistrate has found that there was no cruelty on the part of the husband and he also found that there was no neglect. The husband appears to be living with his parents and there had not been much of cordiality between the parents and the petitioner with the result that she left the house and has not returned to the husband's. After waiting for some years the husband has married a second wife. He offered to take back the petitioner but she refused to go and live with him. Hence the Magistrate dismissed the application.

I see no reason to interfere with the finding on the facts by the Magistrate that there was no cruelty or neglect. It is urged however for the petitioner that the offer of the husband to take her back ought not to have been accepted as a *bona fide* one and reliance is placed for this on the decision in *Sundarammal v. Palaniandi Mudali*.¹ But that was a case in which there was evidence that the husband was guilty of having ill-treated the wife and it was the apprehension of physical ill-treatment that made her refuse his offer. In this case, there is absolutely nothing to indicate that the wife received any physical ill-treatment at the hands of her husband. It is only incompatibility of temperament which prevented the wife from living amicably with her husband's parents that resulted in her leaving her husband's house. So long as the husband is not guilty of any cruelty or of neglect, she is bound to go and live with him. I therefore do not think I will be justified in ordering maintenance to be paid to her. The mere fact that the husband has taken a second wife and that too after waiting for several years and after the first wife refused to join him, cannot be said to amount to cruelty. The petition is accordingly dismissed.

B.V.V.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Potipireddi Sanyasamma

.. *Petitioner.**

v.

Chalamuri Swami Naidu and others

.. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Civil Procedure Code (V of 1908), Order 21, rule 11 (2)—Application for execution not verified—Not in accordance with law so as to save limitation.

An application which, though signed by the pleader, was not verified is not one made in accordance with law so as to save limitation, as Order 21, rule 11, clause (2) of the Code of Civil Procedure requires that the application shall be signed and verified.

Hasan v. Ramachandra, A.I.R. 1929 Bom. 196, referred to.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Vizianagaram, dated the 3rd day of March, 1943 and made in E. P. No. 592 of 1942 in S. C. No. 589 of 1932.

Y. Suryanarayana for Petitioner.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The application of 28th June, 1935, was signed by the pleader and therefore it comes within the scope of the decision in *Hasan v. Ramachandra*.² But Order 21, rule 11, clause (2) of the Code of Civil Procedure requires that the application shall be signed and verified. This application was not verified and therefore it was not in accordance with law so as to save limitation. The succeeding applications were therefore all out of time. The petition is ordered to be dismissed with costs.

K.S.

Petition dismissed.

*C.R.P. No. 954 of 1943.

1. (1940) 1 M.L.J. 171.

2. A.I.R. 1929 Bom. 196.

14th August, 1944.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE BELL.

Kovuru Kalappa Devara

.. Appellant*

v.

Kumar Krishna Mitter (died) and another

.. Respondents.

Contract Act (IX of 1872), section 29—Applicability—Agreement to pay certain sum “after deductions as would be agreed upon”—Vagueness—Unenforceability—Limitation Act (IX of 1908), section 19—Effect of acknowledgment—Extension for three years.

The appellant's assignor and the respondent had dealings in mica in 1930. In 1933, the suit document was executed whereby the respondent undertook to pay to the appellant's predecessor “after two years a certain sum of money with interest after deductions as would be agreed upon.” The claim based on the said document with its original cause of action was assigned to the appellant in 1938 and he filed the suit to enforce the claim in the same year. The parties were in dispute as regards the deductions.

Held, that the expression “after deductions as would be agreed upon” rendered the document vague and that the claim was unenforceable because of section 29 of the Contract Act.

Held further, that the acknowledgment contained in the document of 1933 extended the period of limitation only for three years from that date and the claim based on the original cause of action was consequently time-barred.

Appeal against the decree of the District Court of Nellore in O. S. No. 19 of 1939.

T. R. Venkatarama Sastriar and Alladi Subramanyam for Appellant. .

Sir Alladi Krishnaswami Aiyar and K. Umamaheswaram for Respondents.

The Judgment of the Court was delivered by

King, J.—The appellant here is the endorsee of a document, Ex. A, and at the same time the assignee of all rights under the original cause of action under that document. It is common ground that the appellant's assignor and the respondent had dealings in mica in 1930. The respondent purchased mica from the appellant's predecessor and was in the habit of selling this mica in England and sending cheques to the appellant's predecessor to pay for it. Of one of these cheques he stopped payment. Subsequently in 1933, Ex. A was executed in which the respondent undertook to pay to the appellant's predecessor after two years the sum of Rs. 12,600 with a certain interest “after deductions as would be agreed upon.” It was the claim based upon this document with its original cause of action that was assigned to the appellant in 1938. The learned District Judge has dismissed the suit and the appellant now appeals.

Two main difficulties stand in the way of the appellant and are the reasons why the suit was dismissed. The first is that no suit will lie on the terms of Ex. A itself because they embody an agreement which in the words of section 29 of the Contract Act is one, the meaning of which is not certain or capable of being made certain. The second reason is that if the appellant falls back upon the original cause of action in 1930 although he can rely upon Ex. A as an acknowledgment of indebtedness given by the respondent's predecessor in 1933 that will afford him only a further three years in which to file his suit, and the suit being filed in 1938 is barred by limitation.

It is contended on the first question that section 29 of the Contract Act does not apply and that it will be possible for the Court after scrutinising the various registered notices and other evidence in the case to give some intelligible meaning to the expression “after deductions as would be agreed upon.” It seems to us however that the Court is not called upon to decide between conflicting claims put in by both sides as to the meaning of a document. Section 29 contemplates that that meaning shall be clear on the face of it. The very first illustration given in the section is of an agreement by A to sell to B a hundred tons of oil. That agreement is held in the illustration to be void for uncertainty, though it might be argued that it was open both to A and B to go into the witness box and give evidence from

* Appeal No. 466 of 1941.

which it would not be beyond the power of the Court to arrive at the actual truth regarding an agreement which has been so vaguely expressed. It has been clear from the arguments before us that there are two very obviously different views in regard to the interpretation of the final few words of Ex. A. It has been claimed by Mr. Venkatarama Sastriar on behalf of his client that the real meaning of the phrase is that if in fact there had been no agreement regarding a reduction at any time before suit, and if the money had become payable the full amount of Rs. 12,600 could be claimed. There is also another and, in our opinion, more plausible interpretation that Rs. 12,600 was intended to be the maximum beyond which in no circumstances could the appellant's predecessor claim, and that some deduction was contemplated by both parties as being certain. However, the parties have expressed this matter in a language with which they were not very familiar in so vague a fashion that in our opinion there can be no doubt that the learned Judge was right in holding that the suit based upon the terms of this document must fail by reason of section 29 of the Contract Act.

The next question is whether the plaintiff can sue upon the original cause of action, and this is a question merely of limitation. It is argued that because in the acknowledgment which the respondent's predecessor gave in 1933 there is also a clear promise to pay and that that payment is deferred until a further period of two years, therefore no suit could have been filed even upon the original cause of action by the appellant's predecessor between 1933 and 1935. In support of this contention we were referred to the judgment of Lord Wrenbury in *Spencer v. Hemmerde*:¹

"Thus if he writes, 'I acknowledge the debt and will pay it to you six months hence' the implied promise which would be a promise to pay forthwith, is superseded by the express promise to 'pay six months hence,' and an action cannot be brought until the six months have expired."

Whatever may be the case in England, the question of limitation has been codified in this country in the Limitation Act and it seems to us that an acknowledgment can be used to extend the period of limitation only to the extent which the Limitation Act itself permits. The language of section 19 of the Act is clear that where there is an acknowledgment of liability the result which follows is that the fresh period of limitation shall be computed from the time when the acknowledgment was so signed. There can be no doubt we think that the learned District Judge is right also in holding that any suit based upon the original cause of action in 1930 is barred by limitation.

In the result this appeal must fail and is dismissed with costs.

B.V.V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

The Public Prosecutor, Madras

*Petitioner**

v.

Rathina Pillai

Respondent.

Madras Borstal Schools Act (V of 1926)—Offence under section 379, Indian Penal Code—Detention in Borstal School for one year—Sentence to run in addition to detention in senior certified school—Legality.

The accused was convicted by the Second Class Magistrate of Trichinopoly of an offence under section 379, Indian Penal Code, and sent to the Sub-Divisional Magistrate of Trichinopoly for action to be taken by him under the Madras Borstal Schools Act. The Sub-Divisional Magistrate sentenced him to be detained in the Borstal School for one year and directed that the sentence should be served consecutively with the sentence of two years' detention in a Senior Certified School which the accused was already undergoing.

Held, that under section 8 of the Borstal Schools Act, a sentence of less than two years' detention could not be imposed and that the Act made no provision for sentence to be served consecutively.

Sentence of two years' detention in Borstal School after taking into account the detention in the Senior Certified School substituted.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-

¹. (1922) 2 A.C. 507 at p. 537.

* Cr. R. C. No. 42 of 1944.
(Cr. R. P. No. 416 of 1944).

Divisional Magistrate, Trichinopoly, dated 23rd February, 1944, in C. C. No. 79 of 1944.

The Public Prosecutor (*V. L. Ethiraj*) in person.

Respondent not represented.

The Court made the following

ORDER.—The accused to whom this reference relates was convicted by the Second Class Magistrate of Trichinopoly of an offence under section 379 of the Indian Penal Code and sent to the Sub-Divisional Magistrate of Trichinopoly for action to be taken by him under the Madras Borstal Schools Act. The Sub-Divisional Magistrate sentenced him to be detained in the Borstal School for one year and directed that the sentence should be served consecutively with the sentence of two years' detention in a Senior Certified School which the accused was already undergoing. Under section 8 of the Borstal Schools Act, a sentence of less than two years' detention cannot be imposed and the Act makes no provision for sentences to be served consecutively. The reference must therefore be accepted and there will be substituted for the sentence passed by the Sub-Divisional Magistrate a sentence of two years' detention in a Borstal School. The accused has already more than a year of the sentence which he is undergoing in the Senior Certified School to serve and consequently the sentence of two years now imposed will mean in effect that he will undergo some months of detention less than if he had had to serve the sentence of one year imposed by the Sub-Divisional Magistrate, Trichinopoly, after the expiration of the sentence he is already undergoing in the Senior Certified School.

B.V.V.

Sentence varied.

[PRIVY COUNCIL]

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—LORD RUSSELL OF KILLOWEN, LORD JUSTICE GODDARD AND SIR MADHAVAN NAIR.

Mohindar Singh

*Appellant**

v.

Ramindar Singh and another

Respondents.

Arbitration—Parties to appeal appointing arbitrator “for settlement of all our disputes” and asking Court to refer the case to arbitration—Court referring “the case” to arbitration—Scope of reference—Arbitrator could deal with whole dispute and was not restricted to deciding whether the judgment appealed against was right—Civil Procedure Code (V of 1908), schedule II, para 15.

Where the parties to an appeal appointed a layman as an arbitrator “for settlement of all our disputes in this case” and prayed that the appeal case may be handed over to the said arbitrator, and the Court referred the case to arbitration, the subject of the submission to arbitration is the whole dispute and not merely the matter of the appeal. Even if the decision of the arbitrator was not one that a Court or a lawyer arbitrator could have given the validity of the award cannot be impugned.

S. P. Khambatta for Appellant.

Sir Thomas Strangman, K.C. and *J. M. Parikh* for Respondents.

Their Lordships' Judgment was delivered by

LORD JUSTICE GODDARD.—This appeal is from a judgment and decree of the High Court at Lahore upholding the award of an arbitrator dated December 11, 1937. The circumstances under which the arbitration came to be held are that in the year 1931 the present appellant took proceedings in the Court of the Senior Subordinate Judge at Amritsar claiming possession of 132 kanals of land which he alleged were sold to him by the first respondent who was originally the sole defendant. His case was that the land had been bought for him by Ujagar Singh, as benamidar, for the sum of Rs. 15,500, and this person was subsequently added as a second defendant. The defendant's case was that he had never sold anything to the plaintiff; he had sold the occupancy but not the proprietary rights in his land

to Ujagar Singh who was a real purchaser and not a benamidar for the plaintiff but who had practised a fraud upon him. Then he said that under a threat of criminal proceedings Ujagar had cancelled the sale deeds and the money which had passed was returned. Ujagar Singh filed a written statement denying that the land was sold to the plaintiff or that he (Ujagar) was benamidar for him. It was not till August, 31, 1936, that judgment was given in the suit. It was tried before the Subordinate Judge, Third Class at Amritsar, who found for the plaintiff. He found that the sale to Ujagar Singh was benami, that the plaintiff was the real purchaser, that the defendant had received Rs. 15,500 as the purchase price and that no fraud was proved, but disapproving of the plaintiff's conduct in several respects he awarded no costs. On October, 1 1936, the first defendant appealed to the Court of the District Judge and on February 3, 1937, the plaintiff filed a cross-objection as to costs; but on November 27, 1937, the parties came to an agreement to refer their disputes to arbitration and petitioned the Court to remit the appeal to the arbitrator they had chosen. The agreement is in these terms :

"We the parties, of our own accord have appointed S. Amar Singh, Police Inspector, C. I. A., Railway Police, Lahore, as our sole arbitrator for settlement of all our disputes in this case. We therefore pray that the appeal case may be handed over to the said arbitrator. The award given by him shall be accepted by us without any objection."

The same day the Court made an order in these terms :

"This case is referred to the arbitration of S. S. Sandra Amar Singh, Inspector of Police, Lahore. He would submit his award by December 13, 1937."

The parties attended before the arbitrator on December 6 and 8 and were represented by counsel. It is to be observed that the arbitrator was a relation, a second cousin, to both parties. According to the evidence of the arbitrator he gave both parties an opportunity of calling evidence, but they did not desire so to do but seem to have read to him the papers in the case and to have gone into all the facts from the beginning of the dispute between them. On 11th December the arbitrator made his award. He awarded that the land should be given to the defendant, the present first respondent, and ordered him to pay back Rs. 15,000 by two instalments. In substance therefore he cancelled the sale and put the parties back into their original position except as to the difference between Rs. 15,500 and Rs. 15,000.

The appellant here filed objections to the award in the Court of the District Judge. The only objection material for the purpose of his appeal was that the arbitrator was bound to find whether or not the title to the land had passed to the appellant and that he had no jurisdiction to award him money instead of land. Compendiously, his contention was that the arbitrator could only deal with the appeal and decide whether the judgment of the learned Subordinate Judge was right, whereas the respondent contended that the whole dispute between them was referred to the arbitrator, though no doubt his award would in one way or another have to dispose of the appeal. The Additional District Judge decided in favour of the validity of the award but remitted the matter to the High Court as it involved a sum of Rs. 15,000 which was beyond his jurisdiction. On December 18, 1939, the High Court delivered judgment, upholding the award and it is from this judgment that the present appeal is brought.

Their Lordships are of opinion that the subject of the submission to arbitration clearly was the whole dispute and not merely the matter of the appeal, and the order of the Court referring the matter confirms this view. Had the parties meant only to refer the appeal it would have been quite easy to say so, but the words they have used indicate that the whole case was to be heard *de novo* by the arbitrator who was to settle "all our disputes in this case." It is hardly probable that had the parties intended to refer only the question whether the judgment of the learned Subordinate Judge was right they would have selected a layman as their arbitrator, whereas, if, weary of the delay involved in litigation, they wanted a decision on the merits it was quite natural for them to select an arbitrator of equal relationship to both of them who from the position that he held might be trusted to give an

impartial decision. True the decision he gave was not one that a Court could have given, nor was it one that perhaps would have been given by an arbitrator who was also a lawyer. But for better or worse they chose to submit their disputes to a relative whom they trusted and who was not a lawyer, and he has given just the sort of award that might be expected from a lay arbitrator in the circumstances. In their Lordships' opinion there is no ground for impugning the validity of this award and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant : *T. L. Wilson & Co.*

Solicitors for Respondents : *Hy. S. L. Polak & Co.*

K.S.

Appeal dismissed.

• IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Appukutti Chettiar

• • • Petitioner*

Defence of India Rules (1939), rule 81 (4)—Criminal Procedure Code (V of 1898), Section 517—Prohibitory order under Defence of India Rules from exporting chillies—No provision in order for confiscation of property—Order of confiscation illegal—Section 517, Criminal Procedure Code cannot be invoked.

The clear meaning of rule 81 (4) of the Defence of India Rules is that the property in respect of which the offence is committed may be forfeited by order of the Court only if the order promulgated under rule 81 (2) had so provided. Section 517 of the Criminal Procedure Code is inconsistent with rule 81 (4) and cannot be invoked by reason of Section 3 of the Defence of India Act, to enable a Magistrate to exercise powers which rule 81 (4) does not give him.

Where a person attempted to export chillies out of a district in contravention of an order of the Collector under rule 81 (2) of the Defence of India Rules prohibiting export without license and the order contained at that time no provision for confiscation of the property forming the subject of the offence;

Held, that the Magistrate had no jurisdiction to pass an order confiscating the property under section 517, Criminal Procedure Code.

Narasinha Chettiar v. Emperor, (1943) 2 M.L.J. 500 explained.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Kollegal, in C. C. No. 40 of 1943.

G. R. Jagadisan and J. R. Alwar Naidu for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner in this criminal revision case was convicted by the Sub-Divisional Magistrate of Kollegal of an offence under rule 81 (4) of the Defence of India Rules and sentenced to pay a fine of Rs. 50. The learned Sub-Divisional Magistrate also directed that a cart load of chillies which was the subject-matter of the offence should be confiscated. The propriety of the conviction is not now canvassed but it is contended that the order of confiscation is illegal.

On the 16th July, 1943, the Collector of Coimbatore made an order under rule 81 (2) of the Defence of India Rules in these terms :

"On and after 19th July, 1943, no person shall export chillies by road or rail from any place within the limits of the Coimbatore District to any place outside the limits of the said district within the Madras Province except under and in accordance with the terms of a permit from the Collector of this district or any other officer specially authorised by him in this behalf."

It was for attempting to export chillies from out of the Coimbatore district in contravention of this order that the petitioner was convicted. Rule 81 (4) provides the punishment for a contravention of any order made under rule 81. It states :

"If any person contravenes any order made under this rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty."

* CrI. R. C. No. 324 of 1944.
(CrI. R. P. No. 303 of 1944).

The Collector's order of the 16th July, 1943, did not provide for the confiscation of the chillies in respect of which the order might be contravened. An amendment to the order of the 16th July, providing that the Court might order confiscation was issued by the Collector of Coimbatore on the 29th June, 1944. The offence, however, with which this case is concerned was committed on 12th October, 1943, so that on that date the Court under the provisions of rule 81 (4) had no power to order the confiscation of chillies exported in contravention of the order of 16th July, 1943. The Magistrate did not refer to any provision of law which authorised him to make the order of confiscation, but the learned Public Prosecutor argues that he had authority to make the order under the provisions of section 517 of the Criminal Procedure Code which will apply to property before the Court in cases under the Defence of India Rules in the absence of express language to the contrary. Learned counsel for the petitioner, on the other hand, points to the terms of section 3 of the Defence of India Act which provides that :

"any rule made under section 2 and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act"

and argues that if rule 81 (4) is read with this section, it is clear that full effect must be given to the provisions of rule 81 (4) notwithstanding that section 517 of the Criminal Procedure Code is inconsistent therewith. In support of his contention learned counsel for the petitioner has referred me to a decision of a Bench of the Bombay High Court in *Emperor v. Gulamali Bin Husain*¹. In that case, it was held, having regard to the provisions of Section 3 of the Defence of India Act, that the Chief Presidency Magistrate of Bombay had no jurisdiction to make an order confiscating a sum of Rs. 8,900 lawfully seized by an officer of customs under the Defence of India Rules, which under sub-rule (6) of the rule 90-B has to be disposed of in such manner as the Central Government may by general or special order direct notwithstanding the provisions of section 517 of the Criminal Procedure Code. The case is a stronger one than the case now under consideration, since the question really was whether an order made by a Magistrate under Section 517 of the Criminal Procedure Code displaced an order otherwise validly made by a Customs Officer under the Defence of India Rules. It was, however, definitely stated that having regard to the provisions of section 3 of the Defence of India Act, the rule prevailed over section 517 of the Criminal Procedure Code. In *Narasimha Chettiar v. Emperor*², Kuppuswami Ayyar, J., held that an order of confiscation of the coins in respect of which an offence had been committed under rule 90 (3) could properly be made under section 517 of the Criminal Procedure Code. Rule 90 (3) however, makes no reference at all to confiscation, and the basis of the decision is that the operation of section 517, Criminal Procedure Code, is not excluded merely because section 2, sub-section (3) of clause (iii) of the Defence of India Act enables the Government to make provision for confiscation. Rule 81 (4) unlike Rule 90 (3), does make provision for confiscation, and the clear meaning of the rule is that the property in respect of which the offence is committed may be forfeited by order of the Court "if the order so provides" but not otherwise. Section 517, Criminal Procedure Code is, therefore, inconsistent with rule 81 (4) and if it is invoked to enable a Magistrate to exercise powers which rule 81 (4) does not give him, rule 81 (4) will not have effect as contemplated by section 3 of the Defence of India Act. In my opinion, the Magistrate had no jurisdiction to pass an order confiscating the property under section 517, Criminal Procedure Code. The order of the Magistrate confiscating the chillies is set aside, and the sale price of the chillies now in deposit in the Magistrate's Court will be handed over to the petitioner. The conviction of the petitioner and the sentence of fine imposed on him are confirmed.

K.C.

Order varied.

1. (1941) 43 Bom.L.R. 872.

2. (1943) 2 M.L.J. 500.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VERE MOCKETT, *Officiating Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

Krishnaveni Ammal and another

.. *Appellants**

v.

M. D. Soundararajan (deceased) and others

.. *Respondents.*

Specific Relief Act (I of 1877), section 42—Applicability—Transfer by debtor of his property to his wife and daughter—Suit by a creditor who had not attached the property for bare declaration that the transfer is benami—Not maintainable—Transfer of Property Act (IV of 1882), section 53—Not applicable.

Where one of the creditors filed a suit for a declaration that certain transfers made by his debtor to his wife and daughter were benami in nature for the purpose of defrauding the creditors,

• *Held*, that the suit is not within section 53 of the Transfer of Property Act, and it is not a suit to which section 42 of the Specific Relief Act applies. Nor can an ordinary declaratory suit lie in the circumstances of the case as the plaintiff is neither entitled to any legal character nor to any right in the suit property.

K. R. M. A. Firm by their agent Meyappa Chettiar v. Maung Po Thein, (1926) I.L.R. 4 Rang. 22 *Maung Ba Maung v. Maung Be Yin*, I.L.R. (1940) Rang. 59 (F.B.), approved.

On appeal from the judgment of Chandrasekhara Aiyar, J., dated 17th August, 1942, and passed in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. No. 109 of 1941.

N. Subramanyam, E. R. Krishnan and R. Rajagopal Iyengar for Appellants.

C. R. Rajagopalachari and M. A. Srinivasan for Respondents.

The Court delivered the following

JUDGMENTS: *The Officiating Chief Justice*.—In these connected appeals, the first respondent filed a suit C. S. No. 109 of 1941 against Elayaperumal Naicker as first defendant, his wife E. Balammal as second defendant and his daughter Krishnaveni Ammal as third defendant. There was also a claim against one Nataraja Pillai, the fourth defendant, the first defendant's clerk, relating to the transfer of a motor car. The second and third defendants appeal and so far as they are concerned the form of the suit was for a declaration that certain alienations made in favour of the wife and daughter respectively were benami in nature for the purpose of defrauding the first defendant's creditors. The learned trial Judge, Chandrasekhara Aiyar, J., decreed the suit in favour of the plaintiff and the third defendant appeals in O.S.A. No. 79 of 1942 and the second defendant in O. S. A. No. 8 of 1943. The form of the plaint, and this is made clear by the prayer, is for a declaration that the properties transferred to the appellants were benami in nature. Paragraph 5 states that the transactions are benami and fictitious. This means that the plaintiff alleges not that there was an actual transfer to the defendants but that there was only a transfer in form, the actual property remaining with the transferor. The learned Judge has so found. Accordingly the learned Judge held that section 53 of the Transfer of Property Act had no application, it not being a transfer binding between the parties. It was therefore not voidable at the instance of the creditor. The plaint, however, as already stated, proceeds on the basis that there was no real transaction, the transfers being benami, that is to say, in the name of the wife and the daughter, but the property actually remaining with the husband.

The appellants have contended before us that following upon this finding the learned Judge should have dismissed the suit and that section 42 of the Specific Relief Act could not be called in aid by the respondent in the absence of facts attracting the provisions of Order 21, rule 63 of the Civil Procedure Code. The appellants argued that for these reasons the suit could not be regarded as a declaratory suit. It is not suggested that any claim or objection had arisen for investigation within the meaning of rule 63. The learned Judge, however held that section 42 was not exhaustive, and that the suit although not within section 53 of the Transfer of Property Act would lie apart from the provisions of section 42 of the Specific Relief Act.

That the provisions of section 42 are not exhaustive is well established by authority: *Robert Fischer v. The Secretary of State for India in Council*¹, *Ramachandra Rao v. Secretary of State for India*² and *Secretary of State for India v. Subbarao*³. In each of those cases on the facts the defendants had challenged a substantive right of the plaintiff. In *Robert Fischer v. Secretary of State for India* the plaintiff prayed for a declaration that an order of the Government to his prejudice be declared invalid. In *Ramachandra Rao v. Secretary of State for India*², a suit for a declaration, that an order debarring one from acting as vakil for another in a village Court was void, was held to be maintainable, though not covered by section 42 of the Specific Relief Act. In the latest Madras decision, the *Secretary of State for India v. Subbarao*³, Beasley, C.J. and Bardswell, J., held that a suit by a karnam for a declaration, that an order of the Board of Revenue was invalid as being to his prejudice, was maintainable although not comprehended by section 42 of the Specific Relief Act. At page 755 Bardswell, J., discusses the question as to what extent section 42 is not exhaustive of declaratory suits and he refers to the decision of the Privy Council in *Sheoparsan Singh v. Ramnandan Prasad Narayana Singh*⁴. At page 704 of the Privy Council case, Sir Lawrence Jenkins makes the following observations regarding section 42:

"A plaintiff coming under this section must, therefore, be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves? Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate in case of an intestacy after the death of the defendant widows."

Sir Lawrence Jenkins went on to say that the suit must fail at the very outset, the plaintiffs not being clothed with a legal character or title which would authorise them to ask for a declaratory decree sought by the plaint. In *Ramakrishna v. Narayana*⁵ Napier, J., held that although section 42 was not intended to be exhaustive, declaratory relief would not be given in respect of rights arising out of a contract affecting only the pecuniary relationship between the parties unless there were exceptional circumstances to take it out of the ordinary rule. The learned Judges at page 83 stated that no such case had been brought to their notice. In *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh*⁴, referred to above their Lordships refer to *Kathama Nachiar v. Doraisingha Tevar*⁶, wherein it is stated that reversionary suits were in a special class and had been entertained by the Courts *ex necessitate rei*.

It is well to consider the exact allegations of the plaintiff in his plaint. The effect of the plaint may be stated as follows: Paragraph 3 alleges that the first defendant owes the plaintiff a large sum of money in respect of which he, the plaintiff, had filed C. S. No. 121 of 1939 in the High Court. Paragraph 4 alleges the first defendant was heavily indebted to various creditors. Paragraph 5 and following paragraphs allege the transfers by the first defendant to his wife and daughter, the subject of the suit. Such facts are of almost daily occurrence in the various Courts of this Presidency and the usual and proper remedy in such circumstances would have been for the plaintiff to apply to the Court for an order for attachment before judgment. Had he obtained such an order, he could have attached the properties transferred to the wife and daughter as being the properties of the first defendant. That would have been a perfectly logical course in that he alleges in paragraph 5 that the transfers were made in the name of the wife and daughter. It may be added that the decree in C. S. No. 121 of 1939 was not passed until November, 1941, so that, at the time of this plaint the plaintiff was in no different position from any other creditor of the first defendant. I am of opinion that this suit does not lie and should have been dismissed. It was clearly not within section 53 of the Transfer of Property Act as with respect the learned Judge rightly held. It is not, I consider, a suit to which section 42 of the Specific Relief Act applies. There is no authority for the proposition that on the facts such as these an ordinary declaratory suit can lie. If it were so, the Courts would be flooded

1. (1898) L.R. 26 I.A. 16 : I.L.R. 22 Mad. 270 (P.C.).

2. (1915) I.L.R. 39 Mad. 808.

3. (1935) 65 M.L.J. 186 : I.L.R. 56 Mad. 749.

4. (1916) 31 M.L.J. 77 : L.R. 43 I.A. 91 : I.L.R. 43 Cal. 694 (P.C.).

5. (1914) 27 M.L.J. 634 : I.L.R. 39 Mad. 80.

6. (1875) L.R. 2 I.A. 169, 191.

with suits by creditors attacking transactions made by debtors. As already stated the machinery of the Code relating to attachment before judgment, Order 38, rules 5 to 13 is available to creditors. In such proceedings, if adopted, for example in this case, it would have been for the present appellants to establish their title and very probably a suit could have been properly instituted under Order 21, rule 63 of the Civil Procedure Code.

Whilst the exact facts of this case are not covered by authority in this High Court, there are two decisions of the High Court of Rangoon on the topic. In *K. R. M. A. Firm by their agent Meyappa Chettiar v. Maung Po Thein*¹ the plaintiffs in the suit claimed a declaration of their right to attach certain properties in execution of a decree in another suit. The learned Judges, observing that the suit before them did not fall within the provisions of Order 21, rule 63, proceeded to discuss the applicability of section 42 of the Specific Relief Act. They noted that the plaintiffs had not adopted the remedy by attachment. At page 24 there appears the following observations :

"Before appellants can succeed they must show that they have a right 'as to the property' in suit. The only right which they claim is a right to attach that property under a decree for money. They do not claim that they have themselves any title to the property or to any part of it. All that they are seeking to establish is that their judgment-debtors have rights as to the properties."

They held that the suit was rightly dismissed since the plaintiff claimed no right of his own in the property. More recently in *Maung Ba Maung v. Maung Be Yin*², a Full Bench of the Rangoon High Court considered the following question :

"Can a creditor sue under section 42, Specific Relief Act, for a bare declaration that a transfer has been made by his judgment-debtor fraudulently with intent to defeat or delay his creditors, or must he sue for cancellation of the deed of transfer either as his sole remedy or as a relief further to that declaration?"

The learned Judges held that *K. R. M. A. Firm by their agent Meyappa Chettiar v. Maung Po Thein*¹ was rightly decided. They discuss cases within section 42 of the Specific Relief Act where the suit for a bare declaration could only lie when the plaintiff is entitled to any legal character or to any right as to any property. Dunkley, J., at page 71 observes :

"It is essential to bear in mind the distinction between a substantive right and a right which is conferred by rules of procedure. The right of a judgment-creditor to attach the property of his judgment-debtor is a mere procedural right, conferred by the Civil Procedure Code. It is not a substantive right as to the property, and therefore cannot give rise to a right of suit under section 42 of the Specific Relief Act."

I respectfully agree with the decisions in both *K. R. M. A. Firm by their agent Meyappa Chettiar v. Maung Po Thein*¹ and *Maung Ba Maung v. Maung Be Yin*².

It is true, as laid down in the various decisions to which I have referred, that the general view is that section 42 of the Specific Relief Act is not exhaustive, but there is no authority for the proposition that a suit for a declaratory decree will lie when the plaintiff is neither entitled to any legal character nor to any right in the suit property. To return to the judgment of their Lordships, *Sheoprasan Singh v. Ramnandan Prasad Narayan Singh*³, their Lordships repeat the warning given in *Sree Narain Mitter v. Krishan Soondary Dassee*⁴, where it was stated :

"There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

I consider that this suit should have been dismissed for exactly the same reason as given by their Lordships in *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh*³ to which reference has already been made, namely, because the plaintiff in the appeals before us is clothed with neither a legal character nor title to the suit property I will conclude by adding that their Lordships after noticing the facts in relation to the plaintiff's legal position did not even discuss whether the suit would lie *aliundi*.

1. (1926) I.L.R. 4 Rang. 22.

2. I.L.R. (1940) Rang. 59 (F.B.).

3. (1916) J. M.L.J. 77 : L.R. 43 I.A. 91 :

I.L.R. 43 Cal. 705 at 694 (P.C.).

4. (1872) L.R. I.A. Supp. Vol. 149, 162.

For the above reasons I consider that these appeals should be allowed with costs against respondents 3 to 7 and the suit dismissed without costs.

Kuppuswami Ayyar, J.—I agree.

K.S.

Appeals allowed.

[FEDERAL COURT OF INDIA.]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

In the matter of the powers of the Federal Legislature to provide for the levy of an Estate Duty in respect of property, other than agricultural land, passing upon the death of any person

and

*In the matter of a Reference under section 213 of the Government of India Act, 1935.**

Government of India Act (1935), section 213 and schedule VII, List I, Entry 56—Federal Legislature if competent to make a law for levy of Estate Duty in respect of property, other than agricultural land, passing upon death—Such a levy if falls within any of the Lists in schedule VII—Construction of entry 56 in List I—Reference under section 213—When could be made and answered.

On a reference by the Governor-General under section 213 of the Constitution Act as to whether the Federal Legislature has the power to make a law providing that upon the death of any person there shall be levied an Estate Duty in respect of property, other than agricultural land, passing upon his death,

Held (per Spens, C. J. and Varadachariar, J.) that the Federal Legislature has no power to make a law providing for the levy of "Estate Duty" of the nature and with the incidents of Estate Duty under the English Law and that the levy of such Estate Duty is not a matter included in any of the Lists in the seventh schedule to the Constitution Act.

Held further, that when Parliament has thought fit to enact section 213 of the Constitution Act it is not for the Court to insist on the inexpediency of the advisory jurisdiction. The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection to the reference.

It would no doubt make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under section 104 and a draft bill to be introduced to carry out the proposals. A perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section—and this is particularly so in cases of ambiguity.

Held also, that it cannot be said that the word "succession" used in entry 56 of List I which speaks of "duties in respect of succession to property" is capable of comprehending every kind of passing of property intended to be comprised in the question under reference. The expression "in respect of" in the entry indicates that "succession" is the *subject-matter* of the taxation and not merely the *occasion*. There is more reason and justification for placing a limited construction on entry 56 in List I than the wider one.

Per Zafrulla Khan, J.—Advisory jurisdiction is a jurisdiction, the exercise of which on all occasions must be a matter of delicacy and caution. Unlike section 4 of the Judicial Committee Act, 1833, and section 60 of the Canadian Supreme Court Act, 1906, section 213 of the Constitution Act does not make it obligatory upon the Court to arrive at a determination of the questions referred to it.

Though the procedure in regard to the reference to the Federal Court has, as far as possible, been approximated to a judicial hearing and determination of the questions referred, the advisory opinion is not in the nature of a judicial pronouncement and the Constitution Act does not make an opinion appealable to His Majesty in Council. Nor is it binding on the Governor-General. Whether the pronouncements of the Court in an advisory opinion could be regarded as "law declared by the Federal Court" within the meaning of section 212 of the Constitution Act, so as to be recognized as binding on Courts in British India appears to be open to serious doubt.

The expression "Estate Duty" is not a term of art and carries no precise connotation. A law enacting that upon the death of a person there shall be levied a duty in respect of property passing upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term "succession" used in that entry.

Sir Brojendra Mitter, Advocate-General of India (*S. M. Sadiq*, Advocate, Federal Court, with him), instructed by *K. Y. Bhandarkar*, Agent, for the Governor-General.

Motilal Setalvad, Senior Advocate, Federal Court (*G. N. Joshi*, Advocate, Federal Court, with him), instructed by *K. Y. Bhandarkar*, Agent, for the Governor-General in Council.

* Special Reference No. 1 of 1944.

Dr. Narain Prasad Asthana, Advocate-General of the United Provinces (*Baij Nath Sahai*, Advocate, Federal Court, with him), instructed by *Raizada Sumair Chand Jain*, Agent, for the United Provinces.

M. Hidayatullah, Advocate-General of the Central Provinces and Berar (*R. Kaushalendra Rao*, Advocate, Federal Court, with him), instructed by *B. Banerji*, Agent, for the Province of the Central Provinces and Berar.

Sir Alladi Krishnaswami Aiyar, Senior Advocate, Federal Court (*N. Rajagopala Iyengar*, Advocate, Federal Court, with him), instructed by *Ganpat Rai*, Agent, as *Amicus Curiae*.

The Court delivered the following

OPINIONS : *The Chief Justice*.—The opinion which I am about to deliver is that of my brother Varadachariar and myself.

This is a Reference made by His Excellency the Governor-General under section 213 of the Constitution Act. The questions referred are :—

(1) Has the Federal Legislature power to make a law providing that upon the death of any person there shall be levied an estate duty in respect of property, other than agricultural land, passing upon the death ?

(2) If the Federal Legislature has such power, has it also the power to make a law providing that for the purposes of the aforesaid duty—

(a) 'Property passing upon the death' shall be deemed to include—

(i) Property passing either immediately on the death or after a specified interval, either certainly or contingently, either originally or by way of substitutive limitation ;

(ii) property of which the deceased was at the time of his death competent to dispose ;

(iii) property in which the deceased or any other person had an interest ceasing on the death of the deceased, including, in particular, a coparcenary interest in the joint property of a Hindu family governed by the Mitakshara School of Law ;

(iv) property transferred by the deceased as a gift in contemplation of death or within a specified period before death ;

(v) property passing under any settlement made by the deceased whereby an interest in such property for life or any other period determinable by reference to death was reserved to the settlor ?

(b) The *situs* of movable property shall be such as may be specified in the law or prescribed by rules made under the law.

(3) If the Federal Legislature has not the powers referred to in questions (1) and (2), is the levy of such duties a matter not included in any of the lists in the seventh schedule to the Government of India Act, 1935 ?

(4) If the Federal Legislature has the power referred to in question (1) but not all the powers referred to in question (2), is the levy of a duty on those classes of property mentioned in question (2) in respect of which it has not such powers a matter not included in any of the lists in the seventh schedule to the Government of India Act, 1935 ?

Notice of the Reference was given to the Government of India and to the Provinces and we have heard arguments from counsel for the Governor-General and the Governor-General in Council and from the Advocates-General of the United Provinces and the Central Provinces and Berar. At our instance, *Sir Alladi Krishnaswami Aiyar* was instructed to appear as *amicus curiae* and present what may be called the tax-payer's point of view. We are indebted to all the learned counsel for the assistance that they have rendered.

The circumstances in which the Reference has been made and the form of the questions referred have led to some discussion at the Bar as to the proper course to be adopted in this case. Two particular features of the situation are :—

(1) that the questions relate to contemplated legislation and not to the validity or operation of a measure already passed ; and

(2) that the main question referred, namely, Q. (1), contains only very limited information as to the nature of the tax proposed to be levied.

It may be stated at the outset that when Parliament has thought fit to enact section 213 of the Constitution Act, it is not in our judgment for the Court to insist on the inexpediency (according to a certain school of thought) of the advisory jurisdiction. Nor does it assist to say that the opinions expressed by the Court on the questions referred "will have no more effect than the opinions of the law officers": *Attorney-*

*General for Ontario v. Attorney-General for Canada*¹. That is the necessary result of the jurisdiction being advisory.

The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection. Section 213 empowers the Governor-General to make a reference when questions of law are "likely to arise." It has been urged upon us in the present instance that the reference has become particularly necessary because of a suggestion that the proposed legislation requires to be made possible by a notification to be issued by the Governor-General under section 104 of the Constitution Act. Such a notification can be issued if the subject-matter of the proposed legislation is not enumerated in any of the Lists in Schedule VII to the Act. As the issue of a notification under section 104, thereby adding to the Lists in Schedule VII, is regarded as a matter of some gravity, it seems to have been assumed by the Joint Parliamentary Committee that before issuing such a notification, the Governor-General would ordinarily take the opinion of the Federal Court as to whether the proposed legislation is not covered by any of the entries in the Lists and this is what the Governor-General has thought fit to do in this case. In this class of cases, the reference should, in the very nature of things, be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force. We may, however, add that instances were brought to our notice in which references had been made under the corresponding provision in the Canadian Supreme Court Act when the matter was at the stage of a bill.

It would no doubt make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under section 104 and a draft bill to be introduced to carry out the proposals.

Hence it is that the form of the questions in this case has caused us greater difficulty. When we deal with the questions themselves, it will be seen that we have been obliged to make certain assumptions and reservations in answering them. As observed in *Attorney-General for Ontario v. Attorney-General for Canada*², the necessity for making such reservations may arise in particular cases and the proper course for the Court to adopt in such cases is to make its report with such reservations as may be found necessary.

On behalf of the Governor-General in Council, counsel invited us to answer questions (1) and (2-a) in the negative and questions (3) and (4) in the affirmative. This is slightly different from the position taken up in the statements filed on behalf of the Governor-General in Council, but in a matter of this kind, we are not disposed to attach much importance to this circumstance. He contended that nothing like the proposed tax was mentioned in Lists II and III of the Seventh Schedule to the Constitution Act and that the only relevant entry in the first list, namely, entry No. 56, could not, on its true interpretation, be held to authorise the levy of the proposed tax. He drew our attention to some of the English decisions in which the distinction between a Succession Duty and an Estate Duty had been clearly indicated and asked us to apply the same test here and hold that the proposed Estate Duty was not a duty "in respect of succession to property" within the meaning of that phrase in entry No. 56. Pressed with difficulties arising out of the meagreness of the information contained in the questions as to the nature of the proposed tax, he contended that the language of questions (1) and (2) was enough substantially to represent the charging sections of the proposed Act, that taken with the description "Estate Duty" in question (1), the questions gave sufficient information for the purpose of the present Reference and that other sections of the Bill would only be machinery provisions. Finally he asked us to express our opinion on the assumption that what was proposed to be levied was a tax similar in all material respects to the Estate Duty imposed in England by the Finance Act of 1894.

1. (1912) A.C. 571 at p. 589.

2. (1910) A.C. 27.

(and its later amendments) as interpreted and explained by the decisions of the English Courts thereon; and he referred to the observations of Rigby, L.J., in *Earl Cowley's case*¹ and to the decisions in *Winans v. Attorney-General*² and *Nevill v. Inland Revenue Commissioners*³ as clearly showing that the proposed tax was essentially different from a succession duty and was not therefore covered by the phraseology used in entry No. 56 or any other entry in the lists in Schedule VII.

The Advocates-General of the United Provinces and of the Central Provinces and Berar contended that the proposed tax fell within the ambit of entry 56 of List I and that question (1) and even question (2), to a great extent, must be answered in the affirmative. They urged that the term "succession" is one of wide and general import, as comprehensive as the expression "passing upon the death" in question (1) and that there was no justification for limiting its interpretation by reference to the distinction drawn in England between Succession Duty and Estate Duty. This distinction, they said, was merely the result of the history of this group of taxes in England and of the co-existence of the two kinds of duties. They insisted that a constitutional enactment should be liberally interpreted so as to give the fullest scope and effect to the language employed and avoid as far as possible an inference of an intention to withhold essential powers of taxation from the Indian Legislatures. They pointed out that when Parliament had thought fit to provide in section 137 that Succession Duty, though collected by the Central Government, should form part of the revenues of the Provinces, it would not be right to attribute to Parliament an intention that this provision could be defeated by levying a similar tax under a different name or on a different basis. Referring to a recommendation made in 1924-25 by the Indian Taxation Enquiry Committee in favour of the levy of Estate Duty in India, they argued that it was unlikely that the power to impose this duty was not conferred by the Constitution Act passed some years after that recommendation. Lastly, they pointed out that writers on Political Economy and Public Finance and several enactments in Canada and Australia used the expressions "Death Duties," "Inheritance Taxes," and duties or taxes on "succession" to include both the Succession Duty and the Estate Duty of the English Law. As regards question (2), they contended that, if the Indian Legislature had the power to levy Succession Duty in the wide sense contended for by them, it must also be held to have the power to enact provisions required to make the exercise of that legislative power effective and to prevent evasions of the taxing statute. Many of the categories in the sub-heads forming question (2-a), they said, would, on this principle, be within the competence of the Indian Legislature. In respect of that portion of sub-clause (iii) of question (2-a) which relates to Coparcenary Interest in Mitakshara joint families, they relied on the judgment of this Court in *In re The Hindu Women's Rights to Property Act*⁴ as conclusive in support of the view that survivorship is also a form of succession.

Sir Alladi Krishnaswami Aiyar, at one stage, namely, in the case filed by him, supported the contention that "the answer to the first question must be in the negative," because "an Estate Duty as such could not be comprehended within the scope of the power conferred by the item" (that is, entry No. 56) and there was no other entry in List I or List III capable of being construed as authorising the levy of such a duty. In his statement in reply, he referred to the American, Canadian and Australian decisions relied on by the Government of the Central Provinces in its case and submitted "that it is unsafe to rely on American, Australian or Canadian analogies and that the Court must reach its conclusion on a proper interpretation of the meaning of the expression "duties with respect to succession" in item 56. During the arguments before the Court, he stated that further examination of the question in the light of the arguments urged on behalf of the United Provinces and the Central Provinces rather inclined him to the view that the word "succession" in entry 56 of List I could, without any undue straining of its significance, be held

1. (1898) 1 Q.B. 355.

2. (1910) A.C. 27.

3. (1924) A.C. 385.

4. (1941) F.C.R. 12: (1941) 2 M.L.J. 12: 4 F.L.J. 1 (F.C.).

to include *all* cases of "passing of property on death" and that the entry could therefore be held to comprehend both "Succession Duties" (in the narrow sense) and "Estate Duties." He instanced the case of a Hindu reversioner being spoken as "succeeding" to the estate on the death of a widow, though the widow had only a "limited interest" and the reversioner has been held not to claim under her. He invited our attention to the report of the Percy Committee (the Federal Finance Committee of 1932) and to the White Paper on Constitutional Reforms¹ where the expression "Death or Succession Duties" is used and he asked us to read it as implying that in the opinion of the authors both the expressions "Death Duties" and "Succession Duties" were of the same comprehensive significance. He reiterated the argument based by the Advocate-General of the Central Provinces on section 137 and he apprehended that if the "Estate Duty" and the "Succession Duty" should be held to be two different duties, there might be practical difficulties and conflicts in their levy in view of the financial scheme adopted by the Constitution Act. We do not feel that the illustration derived from the case of the Hindu widow and the reversioner is likely to be very helpful. The "woman's estate" under the Hindu Law is an anomalous conception created by a long course of decisions in an attempt to reconcile various conflicting interests. Nor is the passage cited from the Percy Committee's Report calculated to throw much light on the question. There is nothing to indicate whether the authors thought that the two duties were one and the same or were different. Anyhow, there remains the fact that the Constitution Act did not employ that composite expression but only the expression "duties in respect of succession"—probably taken from item 2 in List I of the Devolution Rules of 1920. Our conclusion must therefore rest on the weight to be given to the other contentions urged before us.

With reference to the form of question (1), we feel that we are at some disadvantage by reason of its inadequacy. It may generally be true to say that questions (1) and (2) correspond to the charging sections of the proposed Act; but a perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section: see *Colquhoun v. Brooks*,² *Rex v. Lovitt*,³ *Attorney-General for British Columbia v. McDonald*, *Murphy Lumber Co.*,⁴ and *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*⁵—and this is particularly so in cases of ambiguity: *Provincial Treasurer of Alberta v. Kerr*.⁶ The expression "property passing upon death" in the question might not be inappropriate even to denote cases of succession (in the limited sense) if the other provisions of the Act indicate only a Succession Duty in the English sense. Reference has no doubt been made in the question to "Estate Duty," but it may be doubted whether it is permissible as a matter of interpretation to import into this country, merely from the use of that expression, all the incidents associated with that tax in the English financial system—see the observations in *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*⁷ as to the connotation of the expression "Estate Duty" used in the Straits Settlements Ordinance considered in that case and as to the danger of using decisions on an Imperial statute in the interpretation of a colonial measure. See also the observation of Lord Robson in *Rex v. Lovitt*⁸, where, dealing with the tax imposed by a Canadian enactment, he said: "although called a succession duty, the tax here in question was laid on the corpus of the property." In a Queensland statute referred to in *Archibald v. Commissioners of Stamps*⁹, the Queensland Legislature had (as pointed out by O'Connor, J.) though adopting the words of the English section, used them in a different context and as part of a different scheme of assessment from that contained in the English Act. As we are not, however, confined strictly to a question of interpretation of the terms used in the Reference and as counsel for the Governor-General in Council has expressly invited us to give our opinion on the assumption that the tax referred to in the Reference as proposed to be levied

1. Cmd. 4268, 1933.

2. (1889) 14 A.C. 493.

3. (1912) A.C. 212.

4. (1930) A.C. 357.

5. (1933) A.C. 378 at p. 389.

6. (1933) A.C. 710 at p. 720.

7. (1933) A.C. 378.

8. (1912) A.C. 212 at p. 223.

9. (1909) 8 C.L.R. 739 at p. 755.

is one resting on the same essential basis and having the same essential incidents as Estate Duty in the English law, we are prepared to express our opinion on that assumption.

It is true that the difference recognised in England between the Succession Duty and the Estate Duty is, to some extent, due to the history of those taxes in that country. But it does not follow therefrom that the difference does not also rest on a real and important difference in the bases on which they rest. It is likewise true that in some Canadian and Australian statutes the expression "Succession Duty" has been employed to denote or to include what would be Estate Duty in the English law; but these were instances in which very little turned on the difference between the two kinds of imposts; the expression was generally found in the "Short Title" of the enactment or taken from it. Similarly the principle of "aggregation" and the principle of "progression" (or graduated scale) associated with the Estate Duty have sometimes been adopted even in respect of Succession Duty; they cannot, therefore, be made the basis of differentiation between the two. It is also to be noted that though economists and writers have dealt with "Succession Duty" and "Estate Duty" under the headings "Death Duties", "Inheritance Taxes," and "Duties on Succession" it cannot be said that they did not recognise a real distinction between Succession Duty and Estate Duty. There are certain common features justifying the treatment of both these methods of taxation under one head; but the distinctive features are also noted. Thus Findlay Shirras in his "Science of Public Finance"—p. 524—classifies Death Duties or Inheritance Taxes "under two categories, an estate tax levied on the inheritance as a whole, and a succession duty or share tax on the separate portions going to the different beneficiaries." He adds that both categories have their peculiar characteristics and proceeds to indicate them, observing that the Estate Duty is a more productive and efficient source of revenue while the Inheritance Tax may be said to be the more equitable. There is one feature common to both taxes, namely, that the *occasion* for the levy is the death of a person; but while Succession Duty has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other considerations relevant from that point of view, the Estate Duty has reference to the value of the property constituting the estate of the deceased and is independent of the question as to who takes it. Thus the distinction drawn in the English decisions between Estate Duty and Succession Duty seems to correspond substantially to a distinction in principle and basis recognised by writers on Economics. The Members of the Indian Taxation Enquiry Committee themselves recognised it; see paragraph 356 of the Report. The judgments in *Provincial Treasurer of Alberta v. Kerr*¹ and in some of the earlier cases therein referred to will also show that that distinction may have a material bearing upon the classification of taxes into "direct" and "indirect" and upon the decision of questions relating to the territorial jurisdiction of legislatures imposing such taxes.

The argument based upon the improbability of Parliament having withheld the power to levy such a tax when framing the constitution in 1935 has no great force. Section 104 has been enacted to meet that very difficulty. That section has also some bearing on the argument founded on section 137; the Governor-General may by a notification under section 104 confer the power even on a Provincial Legislature. If, however, the situation cannot be satisfactorily met in that way, the matter must, of course, go before Parliament. As regards the recommendation of the Taxation Enquiry Committee, it seems to us that it must be taken along with the difficulties pointed out in the report itself as standing in the way of the immediate introduction of such a tax into this country. The recommendations made as to the preliminary steps necessary might well have created the impression that it would be some time before the tax could be introduced, if at all.

Recognising that there are real and substantial differences between Succession and Estate Duties, we now address ourselves directly to the question: in what sense

is the word "succession" used in entry 56 of List I which speaks of "duties in respect of succession to property." Our attention was drawn to the meaning of the word "succession" in dictionaries and law lexicons and it was contended that the word was capable of comprehending *every* kind of passing of property intended to be comprised in question (1). We are by no means satisfied that this is so. Assuming, however, that the word "succession" by itself is capable of a wide significance, can it bear any such meaning in the expression "succession to property," especially when it is read in the light of other indications derivable from the Lists in the Seventh Schedule? The Indian Succession Act broadly divides the subject of "succession" into "testamentary" and "intestate" succession; and the ordinary meaning of succession is the transmission, by law or by the will of man, to one or more persons of the property and the transmissible rights and obligations of a deceased person. That this is the sense in which "succession" is used in the Lists in Schedule VII is indicated by the collocation of the words "wills," "intestacy" and "succession" in entry 7 of List III. Entry 21 in List II contains a corresponding provision in respect of "agricultural land"; and it speaks of "transfer, alienation and devolution" (entry 21 corresponds not only to entry 7 of List III but also to entry 8; hence it deals with transfers *inter vivos* as well as testamentary dispositions and devolution). It is only reasonable to assume that entry 56 in List I and entry 43 in List II, which authorise the levy of duties in respect of succession, refer us back to the succession and devolution provided for elsewhere in the Schedule. The use of the word "to" in the expression "succession to property" lends some support to this view. How different from this is the concept of a duty which [in the words of Rigby, L.J., in *Earl Cowley's case*¹] has no reference to or implication of a relation of predecessor and successor or the existence of a succession. So far as legislative practice is concerned, there can, we think, be no doubt that in England, where the distinctions between the two duties were well-known, a power to impose duties "in respect of succession to property" would be regarded as most inaptly worded if it was intended to include a power to impose an estate duty. If in India there were any conflicting legislative practice, we should not place any great reliance on the English practice. But if there be any legislative practice at all in India, it is to be found generally in the use of the word "succession" in the narrower sense. For reasons indicated earlier in this opinion, we do not think that legislative practice in other Dominions or States is relevant for our purpose.

The expression "in respect of" in entry 56 is also not without significance. It indicates that the "succession" is the *subject-matter* of the taxation and not merely the *occasion*. It may be that the amount of the tax is fixed or regulated with respect to the value of the property but the subject-matter of the tax is not the property but the succession. The significance of this distinction is brought out in *Provincial Treasurer of Alberta v. Kerr*². A tax of which the subject-matter is the "succession" cannot be held to be the same as a tax which "has no relation to the accession to the property of a deceased person"—as the Estate Duty is described by Lord Gorrell to be: *Winans v. Attorney-General*³. It is perhaps right to add that at the present stage we approach the question only from the point of view of ascertaining the *probable* intention of Parliament. When a Court is called upon to pronounce actual legislation *ultra vires*, the viewpoint becomes slightly different; because, though the intention of the Constitution Act is even then the test, the presumption in favour of validity—weak as it may sometimes be—inclines the Court to put as wide a construction as possible on the words used in the enactment. In our opinion, there is more reason and justification for placing a limited construction on entry 56 of List I than for adopting the wider construction suggested.

Counsel for the Governor-General in Council referred to entry 55 in List I only to say that it is not appropriate to describe a levy in the nature of Estate Duty. We agree in this view; and, as the other counsel appearing before us did not suggest anything to the contrary, we do not think it necessary to discuss the entry at any

1. (1898) 1 Q.B. 355 at p. 375.

2. (1933) A.C. 710.

3. (1910) A.C. 27 at p. 40.

length. Entry 13 in List III and the cognate entry 51 in List II are equally inappropriate. Both Estate Duty and Succession Duty may be collected in the form of stamps and in some countries legislation relating to Estate Duty and Succession Duty is included in Stamp Laws; but the duties themselves are in their nature different from stamp duties (*see* Bastable's Public Finance, Bk. IV, Ch. IX, S. 1). The express mention of "duties in respect of succession" in the lists in Schedule VII is itself an indication that the entry relating to "Stamp Duties" was not intended to comprise duties of the other kind.

If the first question is answered in the negative, it will not be necessary to answer the second question which has been framed on the assumption that the Federal Legislature has power to impose the proposed tax. It seems, however, desirable to make a few observations with reference to the arguments advanced by the Advocate-General of the Central Provinces and Berar in respect of this question. The expression "shall be deemed to include" is the method of introducing a statutory fiction, so as to enlarge the scope of a preceding provision in the statute. While it is true that the grant of legislative power in respect of a certain subject-matter will carry with it certain accessory or incidental powers, including a power to enact provisions to make effective the exercise of the main power or to prevent evasion of the law enacted under that power, provisions of this kind are substantially different from provisions calculated to extend the scope of the main power itself by a statutory fiction. It is bound to be a question of much difficulty—and one which, in our opinion, could only usefully be attempted when the legislation has taken much more final form—to determine whether the various provisions set out in question (2) (a) can be regarded as "incidental" or "accessory" in the sense above explained.

The point raised by question (2) (b) does not turn on the construction of the Lists in Schedule VII but on section 99. The legislature may, within limits, have the power to define the *situs* of movable property for the purposes of an Act but the validity of such legislation will depend upon its conforming to the provisions of section 99 of the Constitution Act. The question does not, therefore, admit of a general answer and counsel for the Governor-General in Council did not accordingly invite us to answer this question. There is nothing in List II of Schedule VII to cover the proposed duty.

We are, therefore, of the opinion that the answers to the questions comprised in the Reference are as follow:—

(1) The Federal Legislature has no power to make a law providing for the levy of "Estate Duty" of the nature and with the incidents of Estate Duty under the English Law.

(2) The question does not arise in view of the answer to question (1).

(3) & (4) The levy of Estate Duty of the kind above referred is not a matter included in any of the lists in the seventh schedule to the Government of India Act, 1935.

Our brother Zafrulla Khan finds himself unable to express any opinion on the questions referred. A report will, therefore, be made to His Excellency in accordance with the opinion of the majority.

Zafrulla Khan, J.—Consultation of Judges by the Executive has been the subject-matter of much controversy at the hands of text-writers, jurists and Judges. The attempts made by the first two Stuart Kings of England which were characterised by Sir Edward Coke as "auricular taking of opinions" from the Judges and which eventually led to his own removal from his high office were to a large extent responsible for the bias which is noticeable throughout the judicial history of England against such consultation. These attempts were regarded as interference by the Executive with the proper exercise of their judicial function by the Judges and as tending to undermine their independence. To-day the Crown has come to occupy an impersonal and detached position and the independence of Judges has been secured by means of such effective safeguards that any suggestion of such a suspicion attaching to a reference made by the Executive to the Judiciary may perhaps be

disregarded. That does not mean that the exercise of advisory jurisdiction, even in pursuance of provision made in that behalf in modern statutes, may not often be attended with great inconvenience, occasion embarrassment and result in prejudice to the rights of future litigants. It is a jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution.

That the prejudice against obtaining advisory opinions from Judges is still very strong in England may to some extent be gathered from the protests made in the House of Lords in April, 1928, to a clause contained in the Rating and Valuation Bill of that year whereby it was proposed that in certain events the Minister of Health may submit a substantial question of law to the High Court for its opinion thereon. The condemnation of the clause was so vigorous that the Government thought it wise to abandon it. On the other hand, section 4 of the Judicial Committee Act, 1833 (3 and 4 William IV, c. 41), provides: "It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing and consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear and consider the same; and shall advise His Majesty thereon in manner aforesaid."

Section 60 of the Canadian Supreme Court Act, 1906, empowers the Governor-General in Council to refer important questions of law touching certain matters to the Supreme Court for hearing and consideration. The Supreme Court is bound to entertain and answer the reference, and the opinion of the Court upon such reference is subject to appeal to His Majesty in Council.

The Supreme Courts of the Canadian Provinces and several of the States Supreme Courts in the United States have been invested with similar jurisdiction. The Supreme Court of the United States has consistently refused to pronounce advisory opinions upon abstract questions of law on the ground that to do so would be incompatible with the position that it occupies in the Constitution of the United States.

The Permanent Court of International Justice was invested with competence to deliver advisory opinions by Article 14 of the Covenant of the League of Nations which provided:

"The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

It has given advisory opinions on several occasions with very beneficial results.

Professor Felix Frankfurter (now Mr. Justice Frankfurter of the Supreme Court of the United States) expressed himself on the subject of advisory opinions on legislative proposals twenty years ago in the following terms:—

"The whole *milieu* of advisory opinions on proposed bills is inevitably different from that of litigation contesting legislation. However much provision may be made on paper for adequate arguments (and experience justifies little reliance) advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intimacies of immediacy are wanting. In the attitude of Court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues. Let any one, for instance, compare the adverse opinion of the Massachusetts Supreme Court upon the constitutionality of municipal coal and wood yards with the opinion of the Supreme Court sustaining such legislation; the adverse opinion of the Massachusetts Court on prohibition of trading stamps with the opinion of the Supreme Court sustaining such legislation; the adverse opinion of the Massachusetts Court on the State's power to provide for dwelling houses with the opinion of the Supreme Court sustaining such legislation. These are samples taken from the Court in which, presumably, advisory opinions have been rendered under the most favourable circumstances."

He concluded with the warning:

"It must be remembered that advisory opinions are not merely advisory opinions. They are *ghosts that slay*."¹

Writing in 1931, Professor Carleton Kemp Allen expressed himself as follows:—

"The whole notion of 'consultation' of the judiciary is, by hypothesis, a contradiction which requires exceptional justification. The Judge does not sit in the seat of justice in order to be consulted,

but in order to decide an issue. If, then, he is to be 'consulted,' his advice must be one of two things. Either it is mere opinion, subject to the same limitations as any other opinion—namely, that the person advised may or may not, at his option, follow the advice; in this case it is not easy to see the advantage of imposing this additional duty on judges . . . Or, in the alternative, it is (like the fictitious 'advice' of the Judicial Committee) opinion of such a peculiarly authoritative nature that it is not, and is not intended to be, really opinion at all, but judgment disguised as opinion. There seems to be no cogent motive for extracting opinions from the Bench except to give them an authority which cannot belong to any lesser opinion. • If, then, this opinion is really judgment, it is open to the extremely serious objection that it is anticipatory of actual facts, which are of infinite complexity, and upon which all judgment, in the sense of the application of principle to circumstances, must depend No abstract principle of interpretation laid down in advance by the Courts could be, or at all events ought to be, more than a guide for the decision of subsequent cases. It is therefore either superfluous, or else it is a signpost with a pointing finger in which we may read a gesture, not of direction, but of command or of threat."¹

In *Attorney-General for Ontario v. The Hamilton Street Railway Company*², their Lordships of the Judicial Committee in an appeal from Canada declined to answer certain questions with the following observations:—

"They are questions proper to be considered in concrete cases only, and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

The desirability and utility of advisory opinions is supposed to have been stressed by Lord Loreburn in the judgment of the Judicial Committee delivered by him in *Attorney-General for Ontario v. Attorney-General for Canada*³. A perusal of the judgment however would make it quite clear that in that case the Judicial Committee were concerned (as indeed was bound to be the case) not with the wisdom of the Canadian provision in respect of advisory opinions, but with the question whether that provision had been validly enacted by the Canadian Parliament. The very first sentence of the judgment runs:—

"The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorising questions either of law or of fact to be put to the Supreme Court and requiring the judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament."

At page 582 of the Report Lord Loreburn thus sets out the gist of the arguments advanced on behalf of the Provinces:—

"Broadly speaking, the argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any question, whether of law or fact, it was argued, can be put to the Supreme Court, and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their pre-conceived opinions; whereby may ensue not merely distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biased. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced before the Supreme Court has arrived at what will virtually be a determination of their rights."

On this he observes (p. 583):—

"This view, which was most powerfully presented, has a twofold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the

1. Vol. XLVII, The Law Quarterly Review, pp. 48-49.

2. (1903) A.C. 524 at p. 529.

3. (1912) A.C. 571 at p. 581.

laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada."

Viscount Haldane, L.C. in *Attorney-General for British Columbia v. Attorney-General for Canada*¹ observed as follows :

"It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well-established, and its validity was affirmed by this Board in the recent case of *Attorney-General of Ontario v. Attorney-General of the Dominion*². It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in abstract form without any reference or relation to actual fact, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all questions put to them, and have found it advisable to limit and guard their reply. It will be seen that this is so to some extent in the present appeal."

The view taken by different Lords Chancellor and Judges in the Judicial Committee of the advisability of having recourse to provisions for obtaining advisory opinions on abstract questions of law was revealed by Lord Haldane in the House of Lords during the debate on clause 4 of the Rating and Valuation Bill to which I have made reference earlier. He there said :

"The Dominion of Canada got into the habit many years ago, before my time, of passing Acts submitting abstract questions for the opinion of the Supreme Court of Canada, and then, by a special clause, to the Privy Council here. The Privy Council was not bound to hear those questions, and said so, but the Privy Council, from the desire to be helpful, did get into the practice of entertaining them, and the King in Council pronounces upon them when they come. I have had a long experience of these questions. I have decided scores and scores of them, and anything more unsatisfactory and more mischievous I do not know."

You get a perfectly general question brought up, without reference to specific facts—or, at least, there are no specific facts which enable you to deal exhaustively with the case ; and then what happens? I have heard Lord Chancellor after Lord Chancellor say : "We decline to answer the whole of the questions which are put to us. To do so would be to decide ahead, to go into regions which we cannot survey, and embarrass at every turn private litigants who come hereafter."

At a later stage, he said :

"I referred on the last occasion to the liking which had grown up in Canada for submitting abstract constitutional questions to the Courts there and ultimately to the Privy Council. In my opinion experience of that course has led to enormous inconveniences, and successive Lords Chancellor have objected to and denounced it. The late Lord Herschell said some strong things about it, and at times refused to give an opinion. The late Lord Loreburn was even stronger, and other Lords Chancellor and other Judges in the Judicial Committee have expressed themselves without restraint upon a system which they deemed to be very mischievous. It was mischievous because it invited the Court to go beyond the particular case which it had to decide and to say things beyond the facts to which the decision would be applied, which might prejudice future suitors."

On the same occasion, Lord Merrivale observed :

"I want to say two or three words more with regard to the position of His Majesty's Judges in this matter. It is no part of the business of His Majesty's Judges, and never has been part of their business, at any rate since the Act of Settlement, to have any advisory concern in the acts of the Administration or to take part in advising the Administration. The natural effect of associating them with the Administration and attaching to them the responsibility for conclusions which are put forward by the Administration will be to weaken the authority of the Judiciary. It can have no other effect Why should the Judges be brought in by this side-wind to help the Exe-

1. (1914) A.C. 153 at p. 162.

2. (1912) A.C. 571.

3. 70 H.L. Deb., 5 s., Col. 629-630.

4. 70 H.L. Deb., 5 s., Col. 765.

cutive to carry on their business, to replace the Law Officers and to relieve the Executive of responsibility as to decisions that they ought to arrive at upon the law?"¹

Lord Carson said :

"Anything more dangerous or more unfair to the subject I cannot conceive . . . I cannot imagine anything worse than for us to lay down that such a procedure should be taken as one which may be applied to many other matters. Just fancy applying it to the Finance Acts—to those complicated measures which raise all the taxes of the country. A case might be submitted to the Judges as to whether under a particular clause certain persons should be taxed, and then, if they were advised that that is not the proper construction, they would be told : 'Oh, you were not there ; we have got judgment ; that is what the Courts say.' Anything more mischievous I cannot imagine."²

Nevertheless, in 1935 Parliament thought it wise to incorporate section 213 in the Constitution Act. We must take it, therefore, that in the opinion of Parliament, in spite of the criticism to which provisions of this nature had been subjected, it was desirable that the Governor-General should be enabled to refer to the Court questions of law which in his opinion were of such a nature and of such public importance that it was considered expedient to obtain its opinion upon them. It is to be observed that unlike section 4 of the Judicial Committee Act, 1833 and section 60 of the Canadian Supreme Court Act, 1906, section 213 does not make it obligatory upon the Court to arrive at a determination of the questions referred to it : *In re Allocation of Lands and Buildings situate in a Chief Commissioner's Province*³.

The Court is to report after such hearing as it thinks fit and every report must be made in accordance with an opinion delivered in open Court with the concurrence of the majority of the Judges present with liberty to a Judge who does not concur to deliver a dissenting opinion. Thus the procedure has, as far as possible, been approximated to a judicial hearing and determination of the questions referred.

An advisory opinion on the other hand is not in the nature of a judicial pronouncement and the Constitution Act does not make an opinion appealable to His Majesty in Council. Nor is it binding upon the Governor-General. Whether the pronouncements of the Court in an advisory opinion could be regarded as "law declared by the Federal Court" within the meaning of section 212 of the Constitution Act, so as to be recognised as binding on Courts in British India appears to be open to serious doubt. The very fact that the subject of advisory opinions is dealt with in a section later than section 212 is in itself an indication that an advisory opinion would be no more than an opinion. The marginal note to section 213 indicates that the whole procedure merely constitutes "consultation" between the Governor-General and the Court.

Questions that may be referred to the Court for its opinion under section 213 may fall under different categories, with reference to their nature and subject-matter and to the stage at which and the form in which they are referred. It may be that, for instance, in the case of a dispute between the Centre and a Province, questions may be referred that have reference to concrete matters in controversy between the Governments and it may be possible to proceed to their determination against that background. In a case of that description, the Court may not be faced with any difficulty having relation merely to the subject-matter or form of the Reference.

The Court has already answered References relating to two enactments, one passed by a Provincial Legislature and the other by the Central Legislature, which shows that where the Court is called upon to deliver an advisory opinion with reference to existing legislation, it might be able to do so, subject to such reservations and qualifications as the nature of the questions referred might necessitate. This is not, however, to be taken to mean that in all cases of completed legislation, the Court would be able to deliver an opinion. That must always depend upon the nature of the questions and the material available for their determination.

In the present case we are concerned not with an existing law but with a legislative proposal. That the proposal is of a fiscal nature merely enhances the difficulty of pronouncing upon it in advance. I will not go so far as to suggest that

1. 70 H.L. Deb., 5 s., Col. 763.

2. 70 H.L. Deb., 5 s., Col. 804.

3. (1943) 2 M.L.J. 137 : (1943) 6 F.L.J. F.C.

no legislative proposal could usefully form the subject of a reference and opinion under section 213, but I do apprehend that it would be possible for the Court to pronounce upon such a proposal with confidence only in exceptional cases. A reference relating to a legislative proposal must in a large number of cases be enveloped in a thick fog of hypothesis and uncertainties and an opinion delivered thereon could only rest upon a forest of assumptions which must rob it of all value. If a legislative proposal can be cast in a form which does not give rise to difficulties of this character the Court might find it possible to pronounce upon it. In any event the Court must be furnished with the fullest material on the subject in an exact and precise form and should not be left to base its opinion upon assumptions or be reduced to the necessity of safeguarding against misapprehension or misconstruction of what it might have to say by a profuse employment of "ifs" and "buts" and "provided." In other words, it should be put in a position to arrive at a determination of the questions referred with confidence that its opinion would furnish some guidance and help. One precaution that might be taken would be to attach to the Reference a draft of the bill which it is proposed to place before the legislature. I am not to be understood as suggesting that if such a draft is forwarded, the Court might always find it possible to deliver an opinion, but a draft might be found to be of considerable assistance. It is true that the bill might subsequently emerge from the legislature in a shape very different from that in which it had been considered by the Court. In such a case the opinion of the Court will always be read with reference to the proposal placed before it and there will be no danger of its being read with reference to the form which the legislation finally takes. Such a precaution would be wise in the case of all legislative proposals, but I am disposed to regard it as indispensable in the case of fiscal proposals.

With these observations I proceed to the consideration of the Reference now before us. We were informed that a Reference had become necessary at this stage as the Governor-General had been advised that a law of the description envisaged in paragraphs (1) and (2) of the Reference was not covered by any of the entries in the three lists of the seventh schedule to the Constitution Act and that, therefore, this was a case in which the Governor-General would have to have recourse to his powers under section 104 of the Act. As this was the first occasion on which such a contingency had arisen, the Governor-General had thought it prudent to seek the opinion of the Court before taking appropriate action. I fully appreciate the considerations that have prompted the Reference, but deplore my inability to answer the main questions propounded on the material made available.

The scheme of the proposed legislation is to levy upon the death of a person a duty in respect of property other than agricultural land passing upon the death. To make the duty effective and to render evasion impossible or at least difficult it is proposed to enact "that property passing upon the death" shall be deemed to include certain kinds of property which might not otherwise have been regarded as passing upon the death. It is further proposed to provide that for the purposes of this duty, the *situs* of movable property shall be such as may be specified in the contemplated law itself or prescribed by rules made under that law. We are asked whether the Federal Legislature has power to make a law of this description, and if not, is it not a matter which is not included in any of the Lists of the seventh schedule?

The difficulty that I have felt in dealing with these questions may be illustrated by inviting attention to paragraph (2) (b) of the Reference. This paragraph put by itself would read as follows: "Assuming that the Federal Legislature has power to make a law providing for the levy of an Estate Duty, has it also the power to make a law providing that for the purposes of that duty the *situs* of movable property shall be such as may be specified in the law or prescribed by rules made under the law?"

The answer must depend upon the actual provision with regard to the *situs* of movable property that may be made in the law or that may be prescribed by rules made under the law. In the absence of a draft of the provision itself it would be impossible to say whether the Federal Legislature had or had not the power to

enact such a provision. On this being pointed out, it was conceded on behalf of the Governor-General that to this part of the Reference no answer could be given and the Court was excused from attempting to frame an answer.

The main controversy revolved round the first paragraph of the Reference. The contentions raised are summarised in the opinion just delivered by My Lord and my brother and need not be recapitulated here. It was maintained on behalf of the Governor-General in Council that paragraphs (1) and (2) (a) of the Reference indicated the real nature of the duty proposed to be levied with sufficient exactness for us to be able to pronounce an opinion upon it. I am unable to accept that position. All that the first paragraph tells us is that upon the death of a person there shall be levied an estate duty in respect of property, other than agricultural land, passing upon the death. The expression "estate duty" is not a term of art and carries no precise connotation. I was unable to elicit during the course of the argument what purpose the word "estate" before "duty" in the first paragraph was intended to serve, unless it was the psychologic one of directing our minds to the provisions of the English Finance Act of 1894, whereby estate duty was imposed in England. A law enacting that upon the death of a person there shall be levied a duty in respect of property passing upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term "succession" used in that entry.

We were told that the intention was to levy a duty similar in all material respects to the estate duty imposed in England by the Finance Act of 1894 (and its later amendments) as interpreted and explained by the decisions of the English Courts thereon and we were invited to base our opinion upon that assumption. This means that we are to read into the Reference all the essential and material provisions of the English Finance Act of 1894 and all its later amendments as interpreted and explained in the decisions of the English Courts, and further, that whoever seeks to extract any guidance or derive any profit from the opinion that the Court may be induced to deliver on that assumption must at his peril carry out a careful study of the whole of the English legislation on the subject and of the very voluminous judicial interpretation thereof. I consider this most unsatisfactory. Whenever this Court is invited to render an opinion upon questions of law, the questions must be cast in a precise and exact form and the Reference itself must contain all the material necessary to enable the Court to arrive at a satisfactory determination of the questions. It should not be left to counsel to supplement the Reference during the course of the hearing by oral submissions. Counsel may as of right enter upon an exposition and interpretation of the material contained in the Reference, but that is quite different from varying or supplementing it, which according to their Lordships of the Judicial Committee is not permissible. *Attorney-General for Alberta v. Attorney-General for Canada*¹. For instance, the English Finance Act, 1894, levies a duty upon the "principal value" of all property passing upon the death of a person. There is nothing in paragraph (1) of the Reference which indicates that the duty contemplated in the paragraph is to bear that characteristic. We were informed that that was the intention and that we should assume that the duty would be so levied.

It was urged that paragraphs (1) and (2) (a) of the Reference would form the charging sections of the proposed legislation and that the nature of the proposed duty should be ascertained from the charging sections. When it was pointed out that the Reference contained no information on the method of assessment and collection of the duty we were told that the machinery provisions could have no bearing upon the nature and character of the duty. With that I am unable to agree. In determining the true nature of a tax considerable help may be derived from the machinery provisions and the schedules, etc. *Colquhoun v. Brooks*² and *Rex v. Lovitt*³.

1. (1915) A.C. 363 at p. 369.

2. (1889) 14 A.C. 493 at p. 507.

3. (1912) A.C. 212 at p. 223.

In *Attorney-General for British Columbia v. McDonald Murphy Lumber Company*¹ their Lordships found no difficulty in holding that while a Canadian Act purported to impose a tax on all timber cut within the Province it proceeded in the relative schedules so to reduce the tax by rebate in the case of timber used in the Province as to leave it to operate only on timber exported and that therefore it was in effect an export tax.

In *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*², Lord Macmillan observed :

"It may well be that provisions dealing merely with the machinery of taxation ought not to be presumed to impose a charge, but statutes must be read as a whole and the language used in so-called machinery sections may be called in aid for the interpretation of the charging sections."

In answer to questions whether we could be given an idea of the machinery provisions proposed to be incorporated in the law levying the duty, we were informed that the matter had not yet taken any definite shape, though various alternative proposals had been under consideration. Anybody familiar with conditions in India as compared with those in England would readily appreciate that though the drafting of an Estate Duty Bill upon the model of the English Finance Act of 1894 may not present any serious difficulty so far as the so-called charging clauses are concerned, the devising of the machinery for the assessment and collection of the duty might present insurmountable difficulties. The vast bulk of the people of this country are governed in matters of inheritance and succession by their personal laws and have not the remotest conception of letters of administration, probate and the like. It may therefore well be that though the proposed duty is given the name of estate duty and is levied on "property passing upon death," yet the machinery provisions may perforce have to be so framed as to make the duty in effect a "duty in respect of succession to property" within the meaning of entry No. 56 of the Federal List. I do not think the Court could fairly be invited to make a pronouncement upon the nature of the duty proposed to be levied in the absence of full information upon the subject of machinery, etc., which would be necessary to make the duty effective.

One of the considerations to which our attention was invited during the course of argument as bearing upon the question whether the expression "succession to property" in entry No. 56 of the Federal List should be given a narrow or wide construction, was that Parliament, which must be presumed to have been well aware of the technical distinction between a succession duty and an estate duty as understood in England, had made no express mention of estate duty in any of the Lists. This, it was argued, went to show that "duties in respect of succession to property" in entry No. 56 must be given a wide and liberal construction so as to cover an estate duty. It was urged that Parliament having by entry No. 55 of List I gone so far as to confer upon the Federal Legislature even the power to impose a capital levy it was not to be supposed that it had withheld from that Legislature the power to levy an estate duty. Our attention was directed to section 137 of the Constitution Act which provides that duties in respect of succession to property shall be levied and collected by the Federation but that the net proceeds thereof shall be assigned to the Provinces. It was pointed out that if estate duty was not covered by entry No. 56, List I, and was a matter not included in any of the Lists, Parliament must be deemed deliberately to have left that duty to be allotted at the discretion of the Governor-General to the Provinces or to the Centre and that it was open to the Governor-General by allotting it to the Centre in effect to deprive the Provinces of the benefit of duties in respect of succession to property and thus to defeat the purpose of section 137. Another consequence that would follow would be that whereas even for purposes of collection duties in respect of succession to property had been divided by the Constitution Act between the Centre and the Provinces on the basis of property other than agricultural land (entry No. 56, List I) and agricultural land (entry No. 43, List II), the Governor-General would be at liberty to allot estate duty to the Centre irrespective of the character of the

1. (1930) A.C. 357.

2. (1933) A.C. 378 at p. 389.

property upon which it might be levied. To this the answer given was that paragraph (1) of the Reference itself showed that it was not proposed to levy estate duty upon agricultural land and that it had already been declared that the net proceeds of the duty would be distributed among the Provinces. The rejoinder was that what was proposed to be done was a mere matter of grace and not a matter of legal compulsion and that it was not reasonable to suppose that Parliament had left these important matters to be adjusted by agreement and not by express provision. The only explanation suggested was that having regard to the conditions that prevailed in India, to which reference has been made earlier, Parliament might have felt that it would be extremely inconvenient, if not actually impossible, to levy an estate duty in this country. That again tends to emphasise the consideration already stressed that though the definition of an estate duty may be retained in the proposed law as set out in paragraph (1) of the Reference, the machinery provisions may have to be devised in such a fashion as to make the duty in substance one in respect of succession to property.

The material supplied being insufficient to enable me to pronounce an opinion on the first question, it follows that I am unable to pronounce an opinion upon the second and subsequent questions.

I may point out that assuming that in the absence of material of the kind that I have indicated, an affirmative answer could have been returned to the first question, as it stands, it would have been extremely difficult to return an answer to the whole of question (2) (a) in the absence of such material. It was contended on behalf of the Provinces that if the subject-matter of the first paragraph was covered by entry No. 56 of List I, the various items set out in paragraph 2 (a) could be regarded as merely "incidental" or "accessory" to the main purpose of the duty, designed to make the duty effective and to check evasion thereof. In the case of some of these items at least it would not have been possible to arrive at any conclusion one way or the other in the absence of a draft of the legislative provisions embodying the items. Take, for instance, item (iv) which relates to property transferred by the deceased as a gift in contemplation of death or within a specified period before death. A determination with reference to the first part of the item would depend upon the definition of a gift in contemplation of death and with reference to the second part upon the period that may be specified.

In the state of the material made available to us, I do not think any useful purpose would be served by my attempting to frame answers to the questions referred. Indeed, I apprehend, that any such attempt might result in the opinion delivered being made the foundation of endless litigation hereafter, apart altogether from any question relating to the *vires* of the proposed law, and operating to the serious prejudice of persons whom it might be attempted to bring within the mischief of that law. It is bound to raise ghosts far more troublesome than any that it might serve to lay. For these reasons I am compelled respectfully to decline to express any opinion on the questions referred.

G. R.

Reference answered.

V. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Challur Seshayya

*Petitioner.**

Indian Penal Code (XLV of 1860), section 266—Offence under—Evidence—Possession of false weights—User of weights for trade—Inference as to fraudulent intention.

Where a person is prosecuted under section 266, Indian Penal Code, for possession of false weights the only way in which knowledge and fraudulent intention can be proved is by the possession and the use of the false weights concerned. Where the deficiencies in the weights were approximately five per cent. and the weights were kept by the accused in his shop for the purposes of his trade and were being regularly used,

* Cr. R. G. No. 192 of 1944.

(Cr. R. P. No. 183 of 1944.)

Held, that the accused was liable to be convicted for an offence under section 266, Indian Penal Code.

Abdul Latiff v. King-Emperor, (1943) 1 M.L.J. 486, considered.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Rajampet, in C. A. No. 77 of 1943, dated 30th November, 1943 (C. C. No. 753 of 1943, on the file of the Stationery Sub-Magistrate, Rajampet).

P. R. Ramachandra Rao for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The only question which has been raised on behalf of the petitioner is that there is no evidence of his guilty knowledge or fraudulent intention so as to render his possession of the false weights punishable under section 266 of the Indian Penal Code. When his shop was visited by a police officer, the weights for half a seer and quarter of a seer were tested and found deficient by half tola and one-third tola respectively. These deficiencies are approximately $4\frac{1}{4}$ per cent. and $5\frac{1}{2}$ per cent.. The petitioner's learned advocate relies on the decision in *Abdul Latiff v. King-Emperor*¹; but with all respect to the learned Judge, I consider that the only way in which knowledge and fraudulent intention can be proved in such a case is by the possession and the use of the false weights concerned. It is not the petitioner's case that the weights were very old ones which he had neglected to verify, or that they were new ones which he had accepted as correct; they were weights which he had kept in his shop for the purposes of his trade and was regularly using, and on these facts the only reasonable inference is that he knew they were deficient and was using them fraudulently. It is said that the deficiency is small, but it is obvious that he could have an additional profit of between 4 per cent. and 5 per cent. every time he turned over his stock.

There is no necessity for any interference and the revision petition is dismissed.

B.V.V.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Kaliammai Ammal

... *Appellant**

v.

R. Shanmuga Rajeswara Sethupathi *alias* Naganatha Sethupathi
Avergal, Rajah of Ramnad, a Ward under the Court of Wards,
represented by Manager, Ramnad Estate, Ramnad

... *Respondent.*

Limitation Act (IX of 1908), Articles 110, 120 and 131—Periodically recurring right—Nature of—Perpetual right to recover fixed sum every year—Distinction—Suit to recover arrears of such sums—Article 120 applies and not Article 131.

A perpetual right to receive year after year a particular sum of money is not a periodically recurring right, the quantum of the right being defined once for all, and not varying according to the circumstances each time it accrues.

Where the right is to recover a fixed sum which is not dependent upon the income of the property and the payment of which is an obligation cast upon the person, who is the holder of the property for the time being to pay that particular sum every year, it cannot be said to be a periodically recurring right and hence Article 131 of the Limitation Act can have no application to a suit to recover arrears of such sums.

Where it is found that there is no relationship of landlord and tenant between the parties and the amount claimed was not by way of rent, Article 110 of the Limitation Act cannot apply. The only article that can apply is Article 120 of the Limitation Act.

Appeal against the decree of the District Court of Ramnad at Madura in A. S. No. 658 of 1942, preferred against the decree of the District Munsiff of Ramnad in O. S. No. 187 of 1941.

R. Kesava Aiyangar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The suit out of which this second appeal arises was filed on the 30th June, 1941, to recover a sum of Rs. 336-9-0 for the twelve years prior to suit at the rate of Rs. 20-4-0 for each fasli.

The only question raised by the defendants was whether the suit was not barred by limitation. This depends on the nature of the right which the plaintiff claimed. The trial Court granted a decree for three years and dismissed the suit as regards the rest of the period. The appellate decree has decreed the claim for all the remaining nine years. The view of the appellate Court is that the right is a periodically recurring right and that, therefore, the suit to recover arrears due under a periodically recurring right is governed by Article 131 of the Limitation Act. If the right that is found is a periodically recurring right, then the suit for recovery of the twelve years' arrears payable in respect of that right would be governed by Article 131. That is the only point decided by the Full Bench in *Zamorin of Calicut v. Achutha Menon*¹. In that case it was conceded that the right claimed was a recurring right and there was no decision on that question. But the question that we have to consider is whether the right in this case is a periodically recurring right. A perpetual right to receive year after year a particular sum of money is not a periodically recurring right. The quantum of the right is there defined once and for all. It is payable every year. In such a case it is a perpetual right and not a periodically recurring right. In the case of a periodically recurring right, it must vary according to the circumstances each time it accrues. For example, if the right is to recover certain allowances from and out of the revenues or the income of a particular property, then it may be said to be a periodically recurring right. If the right is to recover from the revenue either a percentage of the collections, or a fixed sum of money out of the collections, it is obvious that the quantum of the right will vary according to the collections. If there are no collections, then there will be no right to recover for that year. If the collections come to a particular figure, then the right cannot be to recover anything more than that sum. Thus in a case as in *Ramnath Zamindar v. Doraiswami*², where the right was to receive Rs. 700 per mensem from out of the income of the property, or as, in the case before the Judicial Committee in *Secretary of State v. Parashram Madhavrao*³, where the right was to recover a particular percentage from the collections of the villages, the right may be described to be a periodically recurring right.

In the case before us, the right is to recover a fixed sum of Rs. 20-4-0. It is not said to be out of the revenue of any particular property. Thus it is not dependent upon the income of the property coming up to Rs. 20 or more. It is an obligation cast upon the person, who is the holder of the property for the time being, to pay a fixed sum of Rs. 20-4-0 every year. Cases of this kind where there is an obligation to pay a fixed sum not dependent upon the varying circumstances of each year cannot possibly be said to be a periodically recurring right. I hold, therefore, that Article 131 of the Limitation Act has no application to this case.

Then the only question is whether Article 120 of the Limitation Act applies or some other Article. The District Munsiff did not find under which Article of the Limitation Act he decreed only three years' arrears. He discussed the question as to the nature of the right in paragraph 9. Referring to a previous judgment between the parties, which recognised this right to receive Rs. 20-4-0 every year, the District Munsiff stated this :

"But this amount is not one by way of rent as the melwaram interest also has been acquired by the first defendant. Thus the appellate Judge (in the previous suit) was not interested in discussing the why and wherefore of this liability, as the same has been admitted by the first defendant. He was only interested for the purpose of preventing disputes between the parties, in incorporating the same in the decree and this the learned Judge does by giving a declaration that the contesting

1. (1914) 26 M.L.J. 377 : I.L.R. 38 Mad. 916.

2. (1884) I.L.R. 7 Mad. 341.

3. (1934) 66 M.L.J. 614 : L.R. 61 I.A. 190 : I.L.R. 58 Bom. 306 (P.C.).

respondent is entitled to the melwaram also subject only to a liability to pay a sum of Rs. 20-4-0 per annum. This is not poruppu as the poruppu is only an amount payable by an inamdar to a Zamindar, nor is it by way of rent, as in the present case, there is no relationship of landlord and tenant."

Thus the District Munsiff found expressly that there is no relationship of landlord and tenant and that the amount claimed was not by way of rent. Article 110, on which Mr. Kesava Ayyangar, the learned advocate for the appellant, relies, is therefore not applicable. There is no question of contract, express or implied and hence Article 115, the only other article suggested, is not applicable. Therefore, the only article that can be applied is Article 120.

I modify the decree of the lower appellate Court by limiting the amount to the amount payable for the six years prior to the suit, *i.e.*, from faslis 1344 to 1349 both inclusive. Each party has succeeded to the extent of half. Therefore, both parties will pay his or their own costs throughout.

No leave.

V.S.

Decree modified.

[PRIVY COUNCIL.]

[On appeal from the Protectorate Court of the Somaliland Protectorate.]

PRESENT :— VISCOUNT MAUGHAM, LORD THANKERTON AND SIR MADHAVAN NAIR.

Galos Hiraid and another

.. *Appellants**

v.

The King

.. *Respondent.*

Criminal trial—Appeal—Counsel assigned by Government on behalf of accused person who was poor—Inability of counsel without any default on his part to reach Court in time—Refusal to adjourn and disposal of appeal in absence of counsel—Propriety.

Just as a conviction following a trial cannot stand if there has been a refusal to hear counsel for the accused, so an appeal cannot stand where there has been a refusal to adjourn the appeal in which the accused appellant as a poor person was entitled as of right to be heard by a counsel assigned to him by the Government, who was unable without any default on his part to reach the Court in time to conduct the appeal.

Appeal by the accused from a decision of the Protectorate Court of Appeal of the Somaliland Protectorate.

J. D. Casswell, K.C. and S. P. Khambatta for Appellants.

The Attorney-General (*The Rt. Hon. Sir Donald Somervell, K.C.*) and *Kenelm Preedy* for the Crown.

Their Lordships' Judgment was delivered by

VISCOUNT MAUGHAM.—In this case the appellants were charged in the Protectorate Court of the Somaliland Protectorate that on or about the first week in June, 1941, at Harawati Balleh near Bohadle in the District of Burao, Somaliland, each of them did participate in a criminal act, namely, intentionally causing the death of Corporal Nur Musa done by several persons in furtherance of the common intention of all and thereby committed the offence of murder punishable under sections 34 and 302 of the Indian Penal Code which applies in the Protectorate.

The trouble in this case seems to have originated shortly after the Italian forces had been driven out of British Somaliland by His Majesty's forces in the year 1941 and was caused partly at least by the circumstance that rifles had been distributed by the Government to a number of the inhabitants to enable them to resist or to protect themselves against the Italians. Rifles were in these circumstances distributed to certain illaloes or native watchmen. In June, 1941, one of the rifles so issued was missing, and it was thought to have come into the possession of a sub-tribe of the Dolbahanta known as the Adan Hagar, to whom also some rifles had been distributed. It was in the course of steps taken by a party of 22 illaloes to recover the missing rifle, which however had already been sent by the Adan Hagar to an illalo post at a village called Garrero, that an affray took place between the

illaloes and the Adan Hagar resulting in the death of 11 of the illaloes. The two appellants were alleged to be in a party of the Adan Hagar consisting of about forty men armed with about 20 rifles and a light automatic.

The trial took place in the month of February, 1942, before Captain George Paterson, Legal Secretary, acting as Judge of the Protectorate Court, and three assessors who were Akils (members of a native Court). Nine persons had been charged, but one was too ill to be tried. The appellants belonged to the Adan Hagar sub-tribe. All the defendants pleaded not guilty, the appellant Mohamed Ibrahim relying on an alibi and calling two witnesses in support of it. Mr. Manilal barrister-at-law was retained by the Government to defend the appellants (amongst others) at the trial and he conducted their defence. A number of witnesses were called.

• It seems desirable to state very shortly the somewhat unusual circumstances which were dealt with in the judgment of the learned Judge :

"In June, 1941, a party of 22 illaloes from Garrero, Bohotleh and Tallabu were investigating the loss of an illalo rifle, and the death of one Imam Mohamed (Abdi Hersi) and for these purposes went to Harawati, where there were some Dolbahanta rer (sub tribe) Adan Hagar Karias. It appears that the missing rifle had come into the possession of the Adan Hagar who decided to send it to the Illalo post at Garrero. This was done and when the Adan Hagar heard that the illaloes were coming they sent a Dolbahanta Akil called Mohammed Abdi and an Elder called Farah Suleman to persuade them to go away. It seems that the illaloes did not believe that the rifle had been returned and they demanded another one as security, possibly because they suspected that this story might simply be a device to get them to return home empty-handed. Anyway, the two emissaries procured a rifle from the Adan Hagar which was handed over to the illaloes. The illaloes did not then leave the neighbourhood and a variety of reasons is suggested as to why they did not do so, the most likely being that as they had also come to investigate a murder they could not leave without finding out something about it.

On the day in question, Mohamed Abdi sent to the Adan Hagar karias, as he said, to arrange for the supply of some milk to the illaloes, leaving them some distance away. Shortly after, he was followed by Farah Suleman and two of the illalo corporals who were themselves members of the Dolbahanta tribe. They had seen three men returning to the karias and thought they might be the men who had returned the missing rifle to Garrero. The remaining sixteen illaloes then went to the Harawati balleh (rain pond) to have a drink and sit in the shade. Ten of them actually reached the balleh, the other six having stopped to urinate some 300 yards to the west of it. Just then a party of rer (sub-tribe or clan) Adan Hagar rer Ali Adan appeared singing. They came from the east and passed about 400 yards south of the balleh going west. Their numbers were variously estimated and it seems that they were about twenty or thirty strong, half of whom were armed with rifles.

According to the prosecution witnesses, this party suddenly saw the illaloes at the balleh, stopped and one of its members fired a round at them, followed by a volley. They say that very shortly after, the rer Ali Adan were reinforced by about forty men (armed with about twenty rifles and a light automatic) of the Adan Hagar rer Farah Adan who came from the karias to the west, and that the illaloes did not return the fire until after the arrival of the second party and one of their number had been hit. They defended themselves to the best of their ability but eventually they were completely surrounded by the Adan Hagar who killed eight of them including Cpl. Nur Musa by rifle fire and hand grenades. At this point the Adan Hagar had succeeded in filtrating between the two parties (of ten and six respectively) and the survivors rose up and fled. In the flight three men were killed, including Abdi Badet. All the accused persons were alleged to be in the second party except Mohamed Ibrahim, who was supposed to have been in the first party.

The Judge at the conclusion of the trial addressed the three assessors. All three expressed the opinion that the appellant Mohamed Ibrahim was not present at the fight (accepting his alibi), one of them expressing the view that it was his brother who had been taken for him. All three assessors expressed the opinion that the appellant Galos Hirad took part in the killing of Nur Musa. The Judge found both appellants guilty of murder under the provisions of sections 34 and 202 of the Indian Penal Code and sentenced them to death. They were then properly informed of their right to appeal and the time within which it was to be lodged. The other accused persons were acquitted.

The appellants duly appealed from the conviction and sentence to the Protectorate Court of Appeal of the Somaliland Protectorate. The Court of Appeal had very wide powers amounting in effect to a re-hearing. Mr. Manilal was again instructed by the Government to appear as advocate for the appellants on the appeal, but, owing to difficulties which will be mentioned later, Mr. Manilal was not able to land in British Somaliland before July 2, 1942, and the appeal was

heard by the Appellate Court which consisted of Major E. P. S. Shirley, on June 22, 1942, in the absence of counsel. The Appellate Judge heard the appellants in person and decided the appeal on a consideration of the record of the case, the judgment of the Trial Judge and the petition of appeal which had been submitted by Mr. Manilal. The Appellate Judge dismissed both appeals. The sentences of death were subject under the law to the confirmation of the Military Governor. The sentences of death were confirmed by Major E. P. S. Shirley (Acting Secretary to the Government) by command of the Military Government on June 26, 1942. Special leave to appeal against the judgment of the Protectorate Court of Appeal was granted by His Majesty in Council on August 10, 1943.

The main ground of the appeal is that there has been no proper hearing of the case before the Protectorate Court of Appeal for the reason that the counsel assigned to the appellants was, in the circumstances to be next mentioned unable to appear at the hearing and to conduct the appeal. The Poor Persons Defence Ordinance No. 26 of 1939 provides as follows:

"Under section 3 :-

(1) Where it appears, for any reason, that it is desirable, in the interests of justice, that an accused person should have legal aid in the preparation and conduct of his defence at his trial and that his means are insufficient to enable him to obtain such aid—

(a) a certifying officer upon the committal of the accused person for trial; or

(b) a certifying officer at any time after reading the depositions recorded in any inquiry held under Chapter XVI of the Administration of Criminal Justice Ordinance into any of the offences specified in the Schedule hereto; or

(c) a certifying officer upon the framing of a charge against a native on trial for an offence against section 304 of the Indian Penal Code or an attempt at, or the abetment of such offence;

may certify that the accused person ought to have such legal aid, and if it is possible to procure an advocate, such accused person shall be entitled to have an advocate assigned to him.

(2) Any such accused person to whom an advocate has been assigned under the provisions of sub-section (1) of this section, shall, if convicted at such trial, be entitled, on his lodging an appeal with the Protectorate Court of Appeal, to have an advocate assigned to him for the preparation and conduct of such appeal."

It appears that Mr. Manilal, who is a barrister-at-law enrolled to practice as an advocate of the Supreme Court of the Colony of Aden and permanently practising in that Colony, is the only person enrolled to practice in British Somaliland and has been in that position for some four years. He has to travel by sea from Aden to Somaliland when required by the British Somaliland Government to defend accused persons on trial on capital charges, and as stated he was retained by that Government to defend the appellants both in the Trial Court and again on the appeal which he was told would take place on June 22, 1942, at Hargeisa. The Government had been in the habit of asking the Movement Control Office to arrange passages for Mr. Manilal when his presence as counsel was required, but owing to the war there was no shipping available between Aden and British Somaliland by which Mr. Manilal could arrive on June 22, as instructed and, in fact, the authorities in British Somaliland, being well aware of the position, had written to him to make any other possible arrangements if there happened to be any chance shipping. The difficulty of the passage across the Gulf of Aden was well-known and on some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that Mr. Manilal should have time to come to Somaliland. No steamship accommodation was in fact available for the journey so as to enable him to appear on June 22, 1942, and it is not suggested that he could be expected to come by a native dhow or similar vessel at this time. However, the case was called on, on June 22, 1942. The Appeal Court Judge, so far as the note goes, made no enquiry with regard to the absence of Mr. Manilal or as to the date when he might be expected to arrive, but proceeded with the case. He heard some very short statements by the appellants and dismissed the appeals. In these circumstances it is contended on behalf of the appellants that there was a disregard of section 3 (2) of the Poor Persons Defence Ordinance and that the appeal has accordingly not been heard in accordance with the provisions applicable in the Protectorate and must be treated as not having taken place with the result that there was nothing which the acting Secretary to the Government could validly confirm so far as the sentence of death was concerned.

It seems to their Lordships that the provisions as regards the right of a convicted person are not of a merely directory character. Sub-section (2) provides that poor persons in the position of the appellants having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. In the case of Somali natives who would probably be illiterate and therefore completely unable to make any criticism on the written judgment of the Trial Judge even if they could read it, it is clear that the provision is of the utmost importance where the penalty is the death sentence. There does not seem to be any reason for a very technical construction to be given to the sub-section in question. The necessity for an assignment of counsel for the purpose of "conducting an appeal" seems to their Lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was called for of the difficulties which, in such a case as their Lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the Judge sitting as the Appeal Court and in the view of their Lordships the provisions of section 3 of the Poor Persons Defence Ordinance so far as regards the appeal have as a matter of substance been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable Mr. Manilal to attend and their Lordships are informed that he in fact arrived in British Somaliland on July 2, 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal.

The importance of persons accused of a serious crime having the advantage of counsel to assist them before the Courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel. (*See Holdsworth History of English Law, Vol. IX, p. 226, et seq.*) This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part, to reach the Court in time to conduct the appeal.

The result is that the appeal to the Protectorate Court of Appeal which appears to have been properly lodged has not been effectively heard. The present appeal must therefore be allowed. Steps must be taken to restore the appeal for hearing either with Mr. Manilal or some other advocate properly assigned to the appellants under circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Hy. S. L. Polak & Co.*

Solicitor for respondent: *Burchells.*

K.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Periyanayagammal

.. Appellant*

v.

Batcha Sahib and another

.. Respondents.

Compromise decree—Construction—Simple money decree—Default clause—Application for taking possession of immovable property—Execution proceeding—Maintainability.

Under the terms of a compromise decree passed in a suit under Order 21, rule 63, Civil Procedure Code, the plaintiff's title to the suit property was recognised and she was to pay the plaintiff in the prior suit a certain sum of money with subsequent interest. The compromise went on to recite that

* A. A. A. O. No. 199 of 1943.

a mortgage right in the property was thereby created in favour of the decree-holder and that on payment of the amount the mortgage was to stand discharged. The decree further provided that in default of payment of the amount the suit properties were to pass to the decree-holder by right of purchase and he was to be allowed to take possession of the property by means of a warrant obtained in execution proceedings. The amount was never paid and eventually the decree-holder applied in execution for possession of the property.

Held, that the decree-holder cannot ask for possession of the property as if he had got a decree for possession. In such a case the parties could not by their agreement provide that what was a simple decree for money should by default of one of the parties automatically become a decree for the possession of immovable property.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated 15th March, 1943, in A. S. No. 16 of 1942, preferred against the order of the Court of the District Munsiff of Kallakurichi dated 13th August, 1940, in E. P. R. No. 92 of 1940, in O. S. No. 577 of 1936.

V. C. Veeraraghavan for Appellant.

Basheer Ahmed Sayeed for Respondents.

The Court delivered the following

JUDGMENT.—This civil miscellaneous second appeal arises out of a compromise decree in a suit under Order XXI, rule 63 of the Code of Civil Procedure. Under the terms of the compromise plaintiff's title to the property in suit was recognised and she was to pay the plaintiff in the prior suit Rs. 600 with subsequent interest. The compromise went on to recite that a mortgage right in the property was thereby created in favour of the decree-holder and that on payment of the amount this mortgage was to stand discharged; in default of payment of the amount the suit properties were to pass to the decree-holder by right of purchase and he was to be allowed to take possession of the property by means of a warrant obtained in execution proceedings. The amount was never paid and eventually the decree-holder applied for possession of the property; this was ordered in the executing Court, and the appeal against it was dismissed by the learned Subordinate Judge.

Part of the argument in this Court is that the compromise amounts to a clog on the equity of redemption, and there has also been some discussion regarding the right of the holder of a compromise decree for money to seek execution against properties charged for the payment of the amount; but it seems to me that both these contentions ignore the main issue in the case. According to the terms of the compromise the plaintiff's title which she asserted in her suit under Order XXI, rule 63 of the Code of Civil Procedure was recognised and she undertook to pay a sum of Rs. 600 and subsequent interest to the decree-holder. This the decree-holder was at liberty to enforce, and if a charge was created on the property for the payment of this amount the decree-holder could doubtless enforce the charge; but it is difficult to see how the parties could by their agreement provide that what was to all intents and purposes a simple decree for money should by default of one of the parties automatically become a decree for the possession of immovable property or, according to another line of argument, a mortgage decree for sale. If only a charge was created, as is maintained by Mr. Basheer Ahmed Sayeed, the decree-holder can proceed against the property to enforce payment; but if, on the other hand, a mortgage was created, in which connection it is of interest to note that the decree was properly registered, then the decree-holder can only proceed against the property by seeking to enforce the mortgage. Whether it is a charge or a mortgage, I purposely refrain from stating at this stage; but I am quite satisfied that under this compromise decree the decree-holder cannot ask for possession of the property as if he had got a decree for possession. The decree-holder can acquire title to the property either by a properly executed and registered transfer or by means of a decree for possession, but title cannot pass in the manner contemplated by the parties automatically by default for non-performance of a condition precedent in a razinamah decree. In the result the appeal is allowed and the petition for delivery of possession is ordered to be dismissed with costs throughout.

Leave to appeal is refused.

B. V. V.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Chundur Venkatasubbamma *alias* Ranganayakamma .. Appellant*

v.

Targu Subbamma *alias* Ammanamma .. Respondent.

Trusts Act (II of 1882), sections 23, 90, 94 and 95—Co-owners of house—One co-owner in receipt of entire rent—No liability to account on foot of what might and ought to have been received—Interest not payable in respect of plaintiff's share of rents.

One co-owner is not a trustee for the other merely because he is in enjoyment of the joint property and collects the entire rents and profits himself.

Kennedy v. De Trafford, (1897) A.C. 180 and *Ramaswami Iyer v. Subramania Iyer*, (1922) 43 M.L.J. 406: I.L.R. 46 Mad. 47, relied on.

• In the absence of any relationship as a trustee and beneficiary, actual or constructive, there is no liability to pay interest.

Where the plaintiff and defendant were co-owners of a building which was rented out from time to time as a shop, and the defendant was collecting the rents, the defendant no doubt comes within the scope of section 94 of the Trusts Act as a person having possession of the property without having the whole beneficial interest therein, but no liability for interest can thereby arise under section 23 in the absence of a breach of trust.

Appeal against the decree of the District Court, Nellore, in A.S. Nos. 94 and 145 of 1941 preferred against the decree of the Court of the District Munsif of Nellore in O.S. No. 628 of 1939.

K. Umamaheswaram for Appellant.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—In this second appeal, preferred by the defendant against the decree of the District Judge of Nellore, the contention raised on her behalf is that the Judge was wrong in holding that there was any fiduciary relationship between her and the plaintiff which rendered her liable to account to the plaintiff not only for her share of the rents of the house actually received but also for what she might and ought to have received. Reliance was placed by the learned District Judge on *Peer Mohideen Rowther v. Aisa Bivi*,¹ as authority for his view. That decision however does not lay down that one co-owner of property jointly belonging to himself and another, the entire income of which he collects, is in the position of a trustee as regards the co-owner not in possession. In that case, there were special facts proved on which Venkatasubba Rao, J., held that the first defendant occupied a fiduciary position as regards the minor plaintiff. The learned Judge refers to the fact that the minor after his father's death was living under the protection of the first defendant who obtained a succession certificate acting as his guardian and who also got certain releases on behalf of the minor. He says

"In the light of the facts proved, I must hold that the learned District Munsif has correctly held that the conduct of the first defendant created, under section 90 of the Trusts Act, such fiduciary relationship as entitled Nagoor Meeran to treat his brother as being in the position of a trustee for him."

There are no such facts in the present case. All that we have is that the plaintiff and the defendant were co-owners of the building which was rented out from time to time as a shop. It was well-settled law that one co-owner is not a trustee for the other merely because he is in enjoyment of the joint property and collects the entire rents and profits himself. (See *Kennedy v. De Trafford*² discussed in *Ramaswami Iyer v. Subramania Iyer*.³)

If it is borne in mind that there was no fiduciary relation between the two parties, the decision of the Judge as regards the second and the third periods of the tenancy can be seen to be wrong. There is evidence that the defendant did

*S.A. No. 1638 of 1943.

1. (1934)* 67 M.L.J. 563.

2. (1897) A.C. 180.

11th August, 1944.

3. (1922) 43 M.L.J. 406: I.L.R. 46 Mad. 47.

not receive anything more than what she said she received during the second period and that in the third period it remained vacant. She cannot be made liable on the footing that she ought to have received more or secure a tenant. As regards the fourth period when one G. Venkatasubbayya is said to have been a tenant on a rent of Rs. 20-8-0 per mensem, the District Judge observes that as "the respondent has omitted to examine the tenant, produce the lease deed or adduce any evidence that the rent actually paid was what she says it was" she must account to the appellant for a reasonable rent. It is pointed out that there was evidence adduced by the defendant's agent that Rs. 20-8-0 was the only rent received from Venkatasubbayya. What the Judge apparently means is that he was not satisfied with this evidence, especially when the tenant was not examined and the lease deed which must be in existence, was not produced. For this period she will be liable at the rate of Rs. 23-8-0 per mensem, which is the rent that prevailed during the second period.

In the absence of any relationship as trustee and beneficiary, actual or constructive, there is no liability for payment of interest. But Mr. Raghava Rao urged on the authority of *Abdul Wajid v. Abdul Rubb*¹ that interest can be directed to be paid under sections 94, 95 and 23 of the Trusts Act. The defendant comes no doubt within the scope of section 94 as she had possession of the property not having the whole beneficial interest therein, but from this it does not follow necessarily that there was any breach of trust committed by her as contemplated by section 23, in which event alone interest will become payable.

The defendant will get credit in the decree to be made for the sums of Rs. 127-5-9 referred to in paragraph 10 of the plaint and the two sums specified in Exs. IV and IV (b) which she paid for and on behalf of the plaintiff in pursuance of attachments and orders of Court. Half of Rs. 69-10-9, the expenditure referred to in paragraph 6 of the judgment of the District Munsif, will also have to go out of the amount of the decree.

The decree of the lower Court will be modified accordingly, parties paying and receiving proportionate costs right through. Leave is refused.

There is no substance in the memorandum of cross-objections, on the grounds of the decision in the second appeal covering the points taken by the respondent. It is dismissed with costs.

K.C.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. Govindaraju Mudaliar

*Petitioner**

v.

Chunduru Hanumantha Rao

Respondent.

Civil Procedure Code (V of 1908), Order 33, rule 8—Application for leave to sue as pauper allowed and numbered as plaint—Objection that suit was beyond pecuniary jurisdiction of Court and return of plaint—Re-presentation deleting one claim, to bring suit within jurisdiction—Plaint not entertainable without fresh permission to sue as pauper on a proper application.

After the numbering as a suit, of an application for permission to sue as a pauper objection was taken that the suit was beyond the pecuniary jurisdiction of the Court and the plaint was returned for presentation to the proper Court. The plaintiff in order to bring the suit within the pecuniary jurisdiction of that Court deleted one of his claims and re-presented it as a plaint.

Held, that the Court could not entertain the re-presented plaint until a proper application had again been made and allowed for leave to sue *in forma pauperis*.

Thadi Chandrayya v. Vaitla Seethamma, (1940) 1 M.L.J. 590 and *Ramaswamy Iyer v. Veerayya Raju*, (1941) 1 M.L.J. 629, relied on.

¹. (1943) 1 M.L.J. 78; I.L.R. (1943) Mad. 654.

*C.R.P. No. 1602 of 1943.

23rd August, 1944.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Tenali, dated 7th August, 1943, in O.S. No. 53 of 1943.

K. R. Vepa for Petitioner.

V. Subramaniam for Respondent.

The Court delivered the following

JUDGMENT.—An application was presented by the petitioner for permission to sue in *forma pauperis* and was numbered as O.P. No. 47 of 1941 on the file of the Court of the District Munsif of Tenali. After the preliminary enquiry as to pauperism, the application was allowed and the plaint numbered as O.S. No. 38 of 1942. Upon objection being taken by the defendant, the Court discovered that it had no pecuniary jurisdiction to try the suit. The plaint was therefore returned for presentation to the proper Court. Some days later, in order to bring the suit within the pecuniary jurisdiction of the District Munsif, the petitioner deleted one of his claims. It was re-presented as a plaint and re-numbered as O.S. No. 53 of 1943. The defendant then raised the objection that since the District Munsif was not competent to entertain the application to sue in *forma pauperis*, because the suit would have been beyond the pecuniary jurisdiction of the Court, the Court could not re-entertain the amended plaint and allow the plaintiff to sue, as a pauper without again considering a proper application to sue in *forma pauperis*. The lower Court accepted that contention and again returned the plaint.

I have no doubt that the lower Court was right. Since the suit would have been beyond the jurisdiction of the District Munsif, he had no jurisdiction to entertain the pauper application; and so the amended but unstamped plaint could not be entertained without an application to sue in *forma pauperis*. It was only after the amendment of the plaint that the Munsif had jurisdiction to entertain an application to sue in *forma pauperis*. The argument of the learned advocate for the petitioner is that the re-presented plaint was the old plaint amended. That is not the case; because the plaint was amended by confining its prayers to something less than was originally asked for, which means that the plaint as re-presented was a different plaint from what was originally presented. Apart from that, however, since the original presentation of an application to sue in *forma pauperis* was invalid, it would follow that the first valid presentation was only when the plaint was re-presented and that the lower Court had no jurisdiction to entertain a suit in *forma pauperis* without an application to sue in *forma pauperis*. This question was considered in *Thadi Chandrayya v. Vaitla Seethamma*,¹ where a question of limitation arose which depended on the answer to the question as to when the plaint was first presented. It was held that since the first presentation was not a valid presentation, the suit was instituted only when a plaint which could be properly entertained by a Court; namely, the amended plaint, was presented. Reliance is placed by the petitioner on a later decision of the same Bench in *Ramaswami Iyer v. Veerayya Raju*,² where a plaint was presented in the Court of the Subordinate Judge of Calicut which could have been presented in the Court of the District Munsif of Calicut, and the Court held that the suit was validly instituted when the plaint was first presented in the Court of the Subordinate Judge. The reasons given by the learned Judges show that this decision, far from supporting the case of the petitioner, re-affirms the previous decision in *Thadi Chandrayya v. Vaitla Seethamma*.¹ Although the earlier decision is not referred to in the judgment of the later decision, the learned Judges said—

"If it had been the case that the Subordinate Judge of Calicut had no jurisdiction to entertain the second respondent's suit we should have no hesitation in accepting the contention of the appellant that the date of the institution of the suit was the 11th August, 1932, when the District Munsif of Chowghat became seised with the matter. The presentation of the plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order

1. (1940) 1 M.L.J. 590.

2. (1941) 1 M.L.J. 629.

and registered. Before a suit can be deemed to be 'instituted' the plaint must be presented to a Court having jurisdiction. But notwithstanding that here the plaint should have been filed in the Court of the District Munsiff by reason of section 15 of the Civil Procedure Code . . . the Subordinate Judge had in fact jurisdiction under the provisions of section 12 of the Madras Civil Courts Act."

It follows from these two decisions, that the lower Court was right in holding that it could not entertain the re-presented plaint until an application had been made to sue in *forma pauperis* and found in the petitioner's favour.

It is finally argued that it was unnecessary for the District Munsif to again return the plaint. Although the petitioner doubtless intended to re-present a plaint, yet what he re-presented was what he had originally presented as an application to sue in *forma pauperis* with a part deleted; and we find that the paper re-presented by him still bears the number O.P. No. 47 of 1941. Mr. Subramaniam for the respondent does not object to the re-presented plaint being considered as an application to sue in *forma pauperis*.

The petition is allowed to the extent that the District Munsif is ordered to treat what was re-presented by the petitioner as an application to sue in *forma pauperis* which he should now proceed to dispose of in accordance with law. The petitioner will pay the costs of the respondent in this Court.

K.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

The Hindu Religious Endowments Board, Madras

.. Appellant*

v.

Vadepalli Jagannathacharyulu and others

.. Respondents.

Madras Hindu Religious Endowments Act (II of 1927), section 69 (2)—Levy of 1½ per cent. contribution for committee even when no temple committee exists—Recovery of contribution under section 69 (1) and (2)—No period of limitation.

The Hindu Religious Endowments Board, Madras, is entitled to levy the 1½ per cent. contribution under section 69 (2) of the Hindu Religious Endowments Act payable for a committee even when there is no temple committee at all.

Hindu Religious Endowments Board, Madras v. Singaracharyulu, (1942) 2 M.L.J. 705: I.L.R. (1943) Mad. 342, followed.

There is no limit of time for the recovery by the Board of the contribution under section 69 (1) or 69 (2) of the Act.

Hindu Religious Endowments Board, Madras v. Sitaramacharyulu, (1942) 2 M.L.J. 732: I.L.R. (1943) Mad. 503, followed.

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, in A.S. No. 50 of 1938 preferred against the decree of the Court of the District Munsif, Narsapur, in O.S. No. 264 of 1936.

The Advocate-General (P. V. Rajamannar) and M. Seshachalapathi for Appellant.

P. Somasundaram and P. Suryanarayana for Respondents.

The Court delivered the following.

JUDGMENT.—The Hindu Religious Endowments Board, Madras, is the appellant. The suit out of which the second appeal arises was filed by the plaintiffs-respondents for an injunction restraining the appellant from levying contribution on the properties in their possession on the ground that the properties were their *archaka* service inam and not the properties of the deity. They also claimed that in any event the appellant Board was not entitled to levy anything more than 1 1/2 per cent. which is the contribution payable to the Board itself under section 69, clause (1) of the Act. They said that the further levy of 1 1/2 per cent. payable for a committee under section 69, clause (2) was improper for the reason that there was no committee functioning during the relevant period. A third conten-

tion was put forward that the claim of the Board was barred by limitation. The levy was made by a notice issued by the appellant Board on the 4th December, 1935 and the levy was from 1927 up to the date of the notice. This, it is said, or a portion of it was barred. Subsequent to the institution of the suit the amount was actually collected and thereafter in effect it became a suit for refund of the amount already collected. The question of declaration of the liability was also involved in the further stages of the suit, because the plaintiffs' claim that the properties were their own archaka service inams, if upheld, would have precluded the appellant Board from levying a contribution even for the future years.

Both the lower Courts held that the properties are not archaka service inams and that they are the endowments belonging to the deity. This question is not open to attack. On the basis that the properties are the temple properties both the lower Courts rejected the claim of the appellant as regards the 1 1/2 per cent. payable in respect of a committee under section 69, clause (2). It has been brought to my notice that after the judgment of the appellate Court, a Bench of this Court has ruled in the *Hindu Religious Endowments Board, Madras v. Singaracharyulu*,¹ that the Hindu Religious Endowments Board is entitled to levy the 1 1/2 per cent. contribution even when there is no temple committee at all or when there was a temple committee and it became defunct. The learned Judges point out that under the provisions of section 60 of the Act, the Endowments Board itself performs all the duties of the committee both in a case where there was no committee to start with and in a case where there was a committee which became defunct. The learned Judges, therefore, held that as the Endowments Board was conducting the duties of the committee they were entitled to levy the contribution provided under section 69, clause (2) of the Act. This is a direct decision in point and I am bound by it.

Mr. P. Suryanarayana, the learned advocate for the respondent, has tried to support the decree of the lower Court on the ground of limitation. Reference was made to Article 120 of the Limitation Act, but the Limitation Act has nothing to do with this question for the simple reason that the Board is not the plaintiff seeking recovery of any amount. There is no limit of time provided by the Legislature for the recovery by the Board of the contribution under section 69 (1) or 69 (2). Apparently they may recover all the arrears due. This question, again, has been considered by my learned brother Kuppaswami Ayyar, J., in a decision reported in the *Hindu Religious Endowments Board, Madras v. Sitaramacharyulu*.² As the learned Judge points out, the Legislature has apparently placed no limitation and the Board may levy all the arrears due.

The decrees of the two lower Courts in so far as they are against the appellants are reversed and the entire suit dismissed with costs throughout. (No leave.)

K.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Devarakonda Venkata Subbaramiah *alias* Subbaramiah and
others

*Petitioners.**

Decree—Ex parte—Appeal against decree dismissed—Application in trial Court before appeal was heard to set aside ex parte decree—Trial Court has jurisdiction to set aside the decree.

Even after an appeal against an *ex parte* decree had been dismissed, it would be open to the trial Court to pass an order on a petition to set aside the *ex parte* decree filed before the appeal was heard.

Subramania Aiyar v. Varadarajulu Naidu, (1927) 53 M.L.J. 110 and *Patamiappa Chetti v. Subramania Chetty*, (1921) 42 M.L.J. 12 followed.

1. (1942) 2 M.L.J. 705: I.L.R. (1943) Mad. 342.

2. (1942) 2 M.L.J. 732: I.L.R. (1943) Mad. 503.

*C.R.P. No. 1169 of 1944.

6th September, 1944.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Elore (Additional Judge), dated 3rd July, 1944, in A.S. No. 112 of 1944 (A.S. No. 193 of 1943, District Court's file)—C.M.P. No. 1440 of 1941 in O.S. No. 267 of 1938, District Munsif Court, Elore.

P. Satyanarayana Rao for Petitioners.

The Court delivered the following

JUDGMENT.—The only point that arises for consideration in this petition is whether after an appeal against an *ex parte* decree has been dismissed, it would be open to the trial Court to pass an order on a petition to set aside the *ex parte* decree filed before the appeal was heard. The learned Subordinate Judge has held that he had jurisdiction to set aside the decree and following the ruling of this Court in *Subramania Iyer v. Varadarajulu Naidu*¹ held that he had jurisdiction to pass an order on the petition and set aside the *ex parte* decree. It is urged before me that the observations of the Privy Council in *Brij Narain v. Tejbal Bikram Bahadur*² were not brought to the notice of the Judge who decided that case and that if those observations are borne in mind it could not be said that the ruling of this Court is correct. In that case the question was whether the original Court had jurisdiction to amend the decree after the matter was taken in appeal and the appellate Court passed a decree. That is altogether a different matter and the question before me was not the subject-matter for decision in that case. Nor has the decision in *Venugopal Mudali v. Venkatasubbiah Chetty*³ any application to the facts of this case. As a matter of fact this question was considered by a Bench of this Court in *Palaniappa Chetti v. Subramania Chetty*⁴ referred to by Curgenven, J., in his judgment in *Subramania Iyer v. Varadarajulu Naidu*¹ and it was pointed out by that Bench that where a defendant has been a party to the appeal which was disposed of, his application to set aside the *ex parte* decree would not lie in the appellate Court but in the first Court.

In the light of these two rulings of this Court, I do not think I will be justified in admitting this revision petition.

The petition is accordingly dismissed.

K.C.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

M. C. Chinniah Chettiar

*Appellant**

Sivagami Achi alias Sornam Achi and others

Respondents.

Hindu Women's Rights to Property Act (XVIII of 1937), section 3 (2)—Widow of adopted son—Suit for partition after second adoption by her father-in-law—Share to which she is entitled.

The widow of an adopted son sued for partition under section 3 (2) of the Hindu Women's Rights to Property Act, 1937, after a second adoption had been made by her father-in-law. On the question whether she was entitled to a half or a third share in the family properties,

Held, that section 3 (2) of the Act does not give the widow any greater rights than those possessed by her husband and inasmuch as at the time she sought partition the joint family had been increased by the adoption of a son by the head of it she could only be given a decree for one-third of the estate.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga, dated 30th November, 1942, in O.S. No. 36 of 1941.

1. (1927) 53 M.L.J. 110.

3. (1915) I.L.R. 39 Mad. 1196.

2. (1910) 20 M.L.J. 587; L.R. 37 I.A.

4. (1921) 42 M.L.J. 12.

70: I.L.R. 32 All. 295 (P.C.).

*Appeal No. 202 of 1943.

4th September, 1944.

B. Sitarama Rao and R. Subramanyam for Appellant.

C. S. Venkatachari and D. Ramaswami Aiyangar for 1st Respondent.

The judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is one of interpretation of sub-section (2) of section 3 of the Hindu Women's Rights to Property Act, 1937. The sub-section states that when a Hindu governed by a School of Hindu law other than the Dayabhag School or by customary law dies, having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had. Sub-section (3) states that an interest devolving on a Hindu widow under the provisions of the section shall be the limited interest known as a Hindu woman's estate, provided that she shall have the same right of claiming partition as a male owner.

The first respondent is the plaintiff in the suit. She is the widow of one M. C. Thiagarajan Chettiar, who was the adopted son of the appellant and was joint with him. Thiagarajan died on the 19th February, 1940. On the 12th June, 1941, the appellant adopted the third defendant (the third respondent). On the 6th August, 1941, the first respondent filed this suit for partition, as she had the right to do by virtue of the Hindu Women's Rights to Property Act. The main question is whether she was entitled to a half share or only to a one-third share in the family property. She claimed to be entitled to a half share because this was the extent of the interest which her husband had in the property at the time of his death. The father-in-law maintained that by reason of his adoption of a son after the death of Thiagarajan the plaintiff's interest was only one-third. The Subordinate Judge considered that it was quite clear that the plaintiff's contention was right and he gave her a decree for partition on the basis that she had a Hindu woman's interest in one half of the estate. The question is not so simple as the Subordinate Judge imagined. In fact it is one of considerable difficulty. On a careful consideration of the very able arguments which have been addressed to us by counsel, we have come to the conclusion that the interpretation placed upon sub-section (2) by the Subordinate Judge is erroneous and that he should only have given the plaintiff a decree for one-third of the estate.

For the plaintiff stress has been laid on the word "had" with which sub-section (2) concludes. It is said that as a son's widow is given the interest which her husband "had" at the time of his death, nothing which happens afterwards can cut down that interest. This argument presupposes that a coparcener's interest in the family estate is a fixed interest and that the word "interest" in the sub-section should be interpreted as "share", which is the word used in sub-section (1). This cannot be accepted. A coparcener's interest is not a fixed interest. It is subject to alteration. For example, it is affected by the death of a coparcener, by the birth of a son to a coparcener, or by the adoption of a son by a coparcener. Lord Westbury, in delivering the judgment of the Privy Council in *Appovier v. Ramasubba Aiyar*¹ said:

"According to the true notion of an undivided family in Hindu law, no individual member of the family whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share."

During his lifetime the interest of the plaintiff's husband was an uncertain one. His father might have had a son born to him. He could, of course, have fixed his share by insisting on partition, but this he did not do. The section does not give the plaintiff any greater rights than those possessed by her husband, and when she sought partition the joint family had been increased by the adoption of a son by the head of it. The question is fully discussed by the learned author of the tenth edition of Mayne at pages 721 and 722, and we are in full agreement

with the observation made there that a widow cannot be deemed to be in a better position than her husband if he had lived.

This Court has accepted the principle that when a coparcener sells or charges his interest in a family estate, the alienee merely gets his interest as it stood at the date of the alienation and it is said for the plaintiff that this supports her case. We do not agree that there is an analogy. Here we are concerned with the interpretation of the statute and we are of opinion, having regard to the words used and the nature of the interest of a coparcener in a joint family governed by the Mitakshara law that the legislature did not intend to give, and has not in fact given, the widow greater rights than possessed by her deceased husband.

It has also been suggested on behalf of the plaintiff that she had demanded a partition before the adoption of the third defendant. If this were in fact the case, her claim for a half share in the property would be well founded; but it is quite clear that no such demand was made until after the adoption had taken place. All that the plaintiff can point to here is a letter which her advocate wrote to her father-in-law on the 31st May, 1941. The plaintiff had received information that her father-in-law proposed to adopt a son, and she entered a protest. She alleged that the proposal was in contravention of an agreement which had been reached between her father-in-law and her father. The concluding portion of the letter reads as follows:

"My client therefore calls on you not to make an adoption in contravention of the said agreement but to fulfil it in all its terms within a week of the receipt hereof, failing which she will be obliged to enforce all the reliefs she is entitled to in virtue of the said agreement and under the Hindu Women's Rights to Property Act, by process of Court." This is not a demand for partition. It is a threat to enforce her rights to partition should her father-in-law proceed with the proposed adoption. Admittedly, she made no actual demand for partition until the adoption had taken place.

The appeal must be allowed and the case remanded to the trial Court to proceed with the partition in accordance with this judgment. The plaintiff will receive from the defendant costs in the trial Court based on the value of one-third of the estate. She will pay to the appellant costs in this Court based on the difference between one half and one-third of the value of the estate.

V.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

M. Mahamood Mamuna Lebbai

.. *Appellant**

v.

The National Bank of India, Ltd., Tuticorin, through its Manager
lawful attorney

.. *Respondent.*

Transfer of Property Act (IV of 1882), section 55, clause (1) (g)—Sale of vendor's right, title and interest in the property as purchaser in Court auction—Not an express contract excluding the applicability of section 55 (1) (g) in respect of charge to which the property was subject.

The vendor purchased the property in Court auction and sold it to the vendee and the sale deed contained a recital that the vendor conveyed to the vendee his right, title and interest in the property as purchaser under the Court auction. Subsequently the vendee discovered that there was a charge on the property. He paid some amount towards the charge and sought to recover it from the vendor who pleaded that the recital in the sale deed excluded the applicability of section 55 (1) (g) of the Transfer of Property Act.

Held, that the covenants implied by section 55 can be excluded only by an express contract and not by implication.

Mahomed Ali Sheriff v. Venkatapathi Raju, (1920) 39 M.L.J. 449, applied.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in A.S. No. 107 of 1941 preferred against the decree of the Court of the District Munsif of Tuticorin in O.S. No. 239 of 1940.

*S.A. No. 712 of 1943.

17th August, 1944.

B. Pocker for Appellant.
King and Partridge for Respondent.

The Court delivered the following

JUDGMENT.—In this case the question is whether there is a contract excluding the applicability of section 55, clause (1) (g) of the Transfer of Property Act. The appellant purchased the properties in question from the respondent and later on it was discovered that there was a charge on the property. Some amount was paid by the plaintiff towards the charge which had ripened into a decree and he filed the suit out of which the second appeal arises for recovery of the sum paid by him. The trial Court granted the decree but the appellate Court reversed it and hence the second appeal.

The sale-deed executed by the respondent in favour of the appellant is Ex. A, dated the 4th September, 1937. The respondent bank had purchased this property in court-auction held in execution of a mortgage decree in O.S. No. 27 of 1931 on the file of the Sub-Court, Tuticorin, against one Shanmugasundaram Pillai and others. The document, Ex. A, recites that the properties described in the schedule attached thereto were the properties of the vendor, the vendor having purchased the same in court-auction mentioned just now. It goes on to say, after referring to the court-auction and the delivery of possession to the vendor, "the vendor has thereby acquired title to sell the same, and whereas the vendor has agreed with the purchaser for the sale of the lands, buildings, trees and premises with all that stand thereon for the price of sum of Rs. 15,800 only. . . . The vendor doth hereby convey and grant unto the vendee his successor and assigns all the right, title and interest of the vendor as purchased by him in Court auction in the properties and parcels of lands, and all appurtenances thereto more particularly described in the schedule hereunder. . . . The question is whether there is a contract to the contrary within the meaning of section 55. Section 55 says:

"In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, ..."

Clause (1), sub-clause (g),

"The seller is bound to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing."

In the present case the property was not sold subject to encumbrances. Therefore, in the absence of a contract to the contrary the vendor is under an obligation to discharge the encumbrances then existing on the property, that is, the encumbrances existing on the date of the sale.

In this case there is no express contract relied upon by the respondent. It was said that there was an implied contract and that implied contract is to be inferred from the sole circumstance that the title conveyed is described to be that derived under a court-auction held in execution of the decree already mentioned. It is said that because the vendor expressly stated that what he conveyed was all the right, title and interest of his as purchased by him in court-auction, a contract to the contrary is to be implied.

As laid down by this Court in *Mahomed Ali Sheriff v. Venkatapatiraju*,¹ the contract to the contrary must be expressed in a clear and unambiguous language. The learned Judges said this at page 452,

"The law is well settled that the effect of a covenant for title is not to be got rid of except by the vendor indicating to the purchaser by use of clear and unambiguous expressions that he did not mean to guarantee that he had a good title to the property and was entitled to convey the same."

The observations which were made with respect to title are equally applicable to the case of a covenant against encumbrances or to the obligation on the part of the vendor to discharge encumbrances then existing on the properties. Mr. Mulla in the Transfer of Property Act says this at page 313, second edition,

"The implied conditions enumerated in this section are supplemented or varied in actual practice by numerous particular conditions. Such conditions are strictly construed in favour of the party whose rights are restricted. In *Seaton v. Mapp*, (1846) 2 Coll. 556, Vice Chancellor Knight Bruce stated the principle of construction as follows: 'I think, and have always thought that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself.'"

This rule is sometimes expressed to be that the provisions of section 55 can be excluded only by an express contract, that is, by clear and unambiguous language contained in the sale-deed itself, clearly indicating that the covenants, implied by that section with reference to which every person is supposed to contract, are not to apply in the particular cases.

The decision of the lower appellate Court is reversed and that of the trial Court restored with costs both here and in the lower appellate Court.

Leave refused.

V.P.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

A. C. T. N. Nagappa Chettiar

*Appellant**

v.

Meenakshi Achi and others

Respondents.

Civil Procedure Code (V of 1908), section 66—Sale deed actually executed reiterating earlier agreement by purchaser in court-auction—Sale not affected by section 66 of the Code.

Where reiterating an earlier agreement there was not merely an agreement to sell executed after a court-sale, but there was an actual sale-deed executed by the person who purchased the property in court-auction conveying the property to the plaintiff,

Held, that section 66 of the Civil Procedure Code was no bar and the sale was valid.

Vadivelu Mudaliar v. Peria Manicka Mudaliar, (1920) 39 M.L.J. 11 : L.R. 47 I.A. 108 : I.L.R. 43 Mad. 643 (P.C.), applied.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, in A. S. No. 26 of 1942, preferred against the decree of the Court of the District Munsiff of Devakottai in O. S. No. 28 of 1941.

V. Ramaswami Aiyar for Appellant.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The only decision brought to my notice is that of the Judicial Committee in *Vadivelu Mudaliar v. Peria Manicka Mudaliar*¹. There, there was an agreement before the court-sale by which A agreed to purchase at a court-auction (to come off later) for and on behalf of B and then to convey the property to B. There was another agreement after the court-sale executed by A and B reiterating the terms of the original agreement. The Judicial Committee pointed out that if the original agreement had stood alone, section 66 of the Civil Procedure Code may be a bar, but that since there was another agreement after court-sale, section 66 did not apply. In the case before us, there was not merely an agreement to convey the property executed after the court-sale, but there was an actual sale-deed executed by the person who purchased the property in court-auction conveying the property to the plaintiff. This case is directly covered by the observations of the Judicial Committee in *Vadivelu Mudaliar v. Peria Manicka Mudaliar*¹, which, I consider, are equally applicable to a case where there is a sale deed after the court-

* S. A. Nos. 664 and 739 of 1943.

17th August, 1944.

1. (1920) 39 M.L.J. 11 : L.R. 47 I.A. 108 : I.L.R. 43 Mad. 643 (P.C.).

sale executed by the court auction-purchaser in favour of the real owner. In the case before the Judicial Committee an agreement to convey to the real owner executed by the court auction-purchaser after his purchase was held enforceable. The subsequent agreement was merely in pursuance of and in reiteration of the prior agreement, which, if it had stood alone, would have no validity. If in that case section 66 is not a bar, I fail to see how in a case where the parties went further and a sale-deed was actually executed in favour of the real owner by the Court auction-purchaser after his purchase the result can possibly be different. I hold that the decision of the lower Court is right and dismiss the second appeal with costs.

There will be advocate's fee only in S. A. No. 664 of 1943. Leave to appeal refused.

• K.C.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Mohammad Ayisha Beevi

.. *Appellant**

v.

A. Samankatha Nadar and another

.. *Respondents.*

Mahomedan Law—Gift—Possession given of bulk of properties—Validity of the entire gift.

Where possession of the bulk of the properties under a gift by a Mahomedan was actually given to the donee, the entire gift would be valid and will confer a title on the donee to sue for possession of the properties which could not be delivered being in the possession of third parties.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 15 of 1941, preferred against the decree of the Court of the District Munsiff of Tuticorin in Original Suit No. 293 of 1939.

S. K. Ahmed Meeran for Appellant.

C. S. Venkatachariar and D. Ramaswami Aiyangar for Respondents.

The Court made the following

ORDER.—The main question for decision in this second appeal is whether the gift under Ex. F executed on the 21st October, 1939, by the plaintiff's father in favour of the plaintiff is valid and effective to pass title to the plaintiff. The trial Court found in favour of the plaintiff and decreed the suit. On appeal the Subordinate Judge held that though the document was proved to have been executed and registered by the donor the gift is invalid for the reason that possession as required by Muhammadan law was not given to the donee. Hence this second appeal.

At the time when the gift deed in question was executed, a final decree in a partition suit had been passed vesting various properties that belonged to the co-sharers severally in the several sharers. Plaintiff's father was a party to the partition suit and the properties in question and some other properties were allotted to him. Unfortunately the decree did not provide for possession being taken in execution of the final decree in the partition suit. The defendants in the present suit were also parties to the final decree in the partition suit and in that suit to which the plaintiff's father and the defendants were parties, the suit properties were allotted to the share of the plaintiff's father. The partition decree was passed on the 5th March, 1938, and the gift deed in favour of the plaintiff (Ex. F) was executed on the 21st October, 1939, and it was duly registered. The material portion of the document runs thus :

"Whereas I have decided that even during my lifetime suitable properties should be given possession of to you and that you should be made entitled thereto, I have this day by means of this deed gifted to you out of my free will and satisfaction the undermentioned properties worth about Rs. 3,000 which I got for my share in the final decree in the partition suit in O. S. No. 46 of 1942, on the file of the Sub-Court, Tuticorin (which was a suit between me and my mother, etc.) and which

properties are in my enjoyment and other properties belonging to me and purchased in my name and out of my own earnings and which are in my enjoyment. You have also accepted them and I have left those properties under your control and enjoyment. Hence from this day you are entitled to and enjoy the properties mentioned in the schedule below with absolute rights of ownership, according to your will and pleasure from generation to generation with rights to sell, gift and alienate. Since out of my free will, I have gifted away all the undermentioned properties to you and since you have accepted them and since their enjoyment was got to you I hereby declare that I have no power for any reason whatsoever to cancel or change this gift. Even if I cancel this gift it will not be valid."

The plaintiff alleged that her father was in possession of the suit property and that she got possession of the property. The District Munsiff held that the donor was in possession on the date of the gift deed Ex. F and that he gave to the plaintiff such possession as the property was capable of. He held that it was not necessary that actual possession should be given by the father to the daughter particularly when the donee was living with the donor at the time of the gift deed. He also held that the defendant got into possession of the suit property only in November 1939.

The first defendant who is the contesting defendant alleged that the donor was never in possession of the suit property and that he did not in fact give possession to the plaintiff. According to him the suit property was always in the possession of one Sadak Marafcar, the son of the donee's uncle and the first defendant took possession of the property after purchasing it in court-auction held in pursuance of a mortgage decree which he obtained against that Sadak on a mortgage executed by him.

The first defendant got possession in court-auction only in November, 1939. The suit gift deed was executed in October of that year. So even if the first defendant got possession in November, 1939, in pursuance of the court-sale at which he purchased the property, that would not affect the validity of the gift deed if on the date when the gift deed was executed, all the requirements of Muhammadan law were complied with.

Before proceeding further, it is important to notice that the gift deed comprises not merely the suit property which was allotted to the plaintiff's father in the partition decree but also other properties which were admittedly the self-acquired properties of the donor. In fact, four properties, three houses and a wet land are comprised in the gift in question. The first consists of two houses bearing Door Nos. 168 and 175 in the 20th ward, Tuticorin Municipality, the second is a house bearing Door No. 129 in the same town; the third is wet land bearing S. No. 318/3 and situated in the village of Iruvappapuram, Kumarapuram, Sri-vaikuntam taluk, and the last item is a house in Madura Municipality. Of these, the property that was purchased by the first defendant in execution of the mortgage decree against Sadak and which is involved in this suit is the wet field mentioned above.

In a case where there are a number of properties comprised in the gift deed and the donee is put in possession of some of them, the High Court of Bombay held in *Chanda Saheb Kashim Saheb v. Ganga bai*¹ that the requirements of Muhammadan law are satisfied even as regards the properties of which actual delivery was not made. The requirements of Muhammadan law as to seisin are satisfied in a case where possession of the bulk of the properties is given to the donee. In that case there were a number of fields covered by the gift deed. Possession was given of several of them but not of a few. The question arose whether the gift was invalid as regards the property of which actual possession was not given. The High Court held that in such a case the entire gift is valid. In that case, the property of which possession was not delivered was in the possession of a mortgagee and the High Court held that in such a case possession is not necessary. But this apart, the Bombay High Court considered the question on the assumption that possession even in such a case was necessary, whether the gift was valid having regard to the fact

1. (1921) I.L.R. 45 Bom. 1296.

that all the other properties were put in the possession of the donee. The learned Judges say this at page 1300 :

"But another question arises whether we should not look at the gift as a whole and not merely look at that portion of it which purported to convey to the donee the equity of redemption in the mortgaged properties. There is here a gift of five properties which are set out at page 1 in the judgment of the Second Class Subordinate Judge in remand. Certain of those properties which were in the possession of the donor were actually handed over to the donee, and our attention has not been drawn to any authority which goes to show that we are bound to split up a deed of gift, by which various properties are given, into its component parts, and consider the gift in respect of that portion of the property of which possession could be given as valid, and in respect of that portion of the property of which possession could not be given as invalid. That being the case, we see no reason why we should not consider that the principles of Muhammadan law were complied with when possession was given to the donee of the properties then in possession of the donor, and that would be sufficient to support a claim to redeem the properties which were in possession of the mortgagee."

The Judicial Committee held in *Muhammad Abdul Ghani v. Fakir Jahan Begam*¹ that delivery of part of the zamindari which was the subject of the gift was delivery of the whole. On pages 314 and 315 the Judicial Committee say this :

"But in the Courts below and in this appeal it has been contended that the deed of the 7th of March 1884, is void so far as it purported to be a gift of the property in question in this suit on the ground that no possession was actually taken of this particular property, and no mutation of names in respect of this particular property was obtained by Lutf-Ullah-Khan until Munni Bibi had died in 1906.

That contention has raised a question by no means easy of solution. The solution of that question depends upon what are the facts here and upon what is the rule of Muhammadan law applicable to those facts. In considering what is the Muhammadan law on the subject of gifts *inter vivos* their Lordships have to bear in mind that when the old and admittedly authoritative texts of Muhammadan law were promulgated, there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, and Revenue Courts to record transfers of the possession of land, or any zamindari estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee, of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift."

Lutf-Ullah-Khan was the donee and Munni Bibi was the donor, and possession was not taken during Munna Bibi's lifetime. After laying down the three conditions of Muhammadan law as regards a valid gift *inter vivos* (a) manifestation of the wish to give on the part of the donor ; (b) the acceptance of the donee, either impliedly or expressly; and (c) the taking of possession of the subject-matter of the gift by the donee either actually or constructively, the Judicial Committee proceeded thus :

"In their Lordships' opinion the whole zamindari property mentioned in the deed, and not parts of it only, must, for the purposes of this case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. The wish of Munni Bibi to give that property to Lutf-Ullah-Khan and his acceptance of it on the 7th of March, 1884, are clearly manifest from a perusal of the deed which he received and acted upon."

The only distinguishing feature between that case and the present one is that the property involved in this suit is a wet field situated in one taluk and the other properties are in other taluks. This is the distinction relied upon by Mr. Venkatachariar, the learned advocate for the respondent, but I do not see how that is really a distinction which is material. In this case, the suit property is a portion of the entire property covered by the gift. As such there is considerable force in the argument of the appellant that the case is covered by the decision of the Judicial Committee in *Muhammad Abdul Ghani v. Fakir Jahan Begam*¹. But Mr. Venkatachariar draws my attention to *Sadik Husain Khan v. Hashin Ali Khan*², a decision of the Judicial Committee. The present question was not the subject of decision by the Judicial Committee. There a Muhammadani made a settlement reciting that Rs. 85,000 was due by the settlor to his wife for her dower and that it had been agreed between the parties that the settlement should be in full satisfaction of the dower debt, and that for the consideration stated the settlor granted certain properties to the trustees upon trust to pay the net income of the properties to his

1. (1922) 43 M.L.J. 453 : L.R. 49 I.A. 195 ; I.L.R. 44 All. 301 (P.C.).

2. (1916) 31 M.L.J. 607 : L.R. 43 I.A. 212 : I.L.R. 38 All. 627 (P.C.).

wife for her life and after her death upon trust for all the children of the settlor and his wife living at the time of his death. The document was never executed by the wife, and there was no evidence, independent of the deed, to show that any agreement was ever entered into between the settlor and his wife that she would accept the provision made for her in the settlement in satisfaction and discharge of the unpaid balance of her dower. The first question was whether the settlement operated as a conveyance for consideration or as a gift. Having regard to the fact that the wife was not a party to the deed and that she never accepted it, the Judicial Committee held that it was to be treated as a mere gift. So treating it, the question arose whether the requirements of Muhammadan law as to delivery of possession were complied with. The trustees were the persons in whom the legal estate in the subject-matter of the gift vested for the benefit of the beneficiaries. On evidence the Judicial Committee held that nothing was done by the donor which amounted to delivery of possession of the properties, and that nothing was done by the trustees or the wife amounting to proof of the acceptance of the gift or of an election to take under the deed. It was also pointed out that the conduct and actions of the wife were entirely inconsistent with any such intention on her part. The trustees never entered under and by virtue of the trust deed into the receipt of the rent or income of the property comprised in the document, and there was no proof that possession of any portion of the property which was the subject of the gift was ever delivered by the settlor to the trustees. On the finding that the gift was never accepted either by the wife or by the trustees, the transaction failed to take effect even as a gift. Then coming to the question of possession, the Judicial Committee pointed out that the properties which were the subject of the settlement consisted of certain house properties in Calcutta and of some villages in the United Provinces. It was urged before the Judicial Committee that there was evidence to show that the trustees took possession of the house in Calcutta and it was argued that there being possession of part of the property, the gift took effect even as regards the villages situated in the United Provinces. Dealing with this aspect of the case the Judicial Committee said this on page 657 :

“ There is no satisfactory evidence, therefore, in their Lordships’ opinion, that the trustees ever entered, under and by virtue of the trust deed, into receipt of the rent or income of the property comprised in the mortgage sued upon, and consequently there is no satisfactory proof that the possession of this portion of the property, the subject of the gift, was ever delivered by the settlor to the trustees.

Even if the proof of the receipt of the rent of the Kothi, 13, Russell Street, Calcutta were so satisfactory as to support the conclusion that possession of it had been delivered to the trustees at the date of the trust deed, or indeed at any time during the life time of the settlor, which, in their Lordships’ view, it is not, the receipt of the rent of these premises, differing altogether as they do in nature and character from the property mortgaged, separated by many miles from these *jagir* villages, and not forming with them one concrete whole, would furnish no proof whatever of the delivery by the settlor to the trustees of his shares in the villages mentioned in the mortgage. Their Lordships are, therefore, of opinion that possession of the property mortgaged not having been proved to have been delivered the gift is, according to the Muhammadan law applicable to the case, void, and that the mortgage, sued upon is therefore a valid and a binding instrument, and a good security.”

Having regard to the prior findings of the Judicial Committee that there was no acceptance of the gift by the wife or the trustees and that in fact there was no evidence of the receipt of rent even of the Calcutta property, these observations can only be regarded as *obiter*. These observations cannot, in my opinion, be relied upon in the face of the direct decision of the Judicial Committee in the case already referred to, *Muhammad Abdul Ghani v. Fakir Jahan Begam*¹.

The decision of this Court in *Fakir Naynar Muhammad Rowther v. Kandaswam Kulathu Vandan*², is very strongly relied on. In that case it was held that delivery of possession is essential and that without such delivery the gift is invalid. *Abdur Rahim, J.*, who delivered the leading judgment said this on page 128 :

“ The reason for the rule requiring delivery of seisin in order to complete the gift is that such a disposition of property being without consideration, the donor if he has failed to divest himself completely of every interest in the property he cannot be called upon to do any act in order to give

1. (1922) 43 M.L.J. 453 : L.R. 49 I.A. 195 : 2. (1911) I.L.R. 35 Mad. 120 at 129.
I.L.R. 44 All. 301 (P.C.).

effect to his intention. This is the juristic ground on which the condition as to delivery of possession is based and is stated as the second argument of the Hanafi doctors, at page 482 of Hamilton's 'Hedaya.' * * * But it is however argued that the rule should not be applied in a case where the donor himself is not in possession of the property, because the result of that would be to unduly hamper free disposition of property. On this point also it seems to us that the view of the Hanafi authorities is clearly opposed to the appellant's contention."

The question that I have to decide did not arise for decision in that case. Here a portion of the property—a good portion of it was according to the appellant delivered to the donee and the question is whether the gift takes effect as a whole, i.e., even as regards the property of which possession was not delivered owing to the fact that the donor was not in possession at that time. Further, in this case the donor has done all that he could do to enable the donee to recover possession of the property from the person in whose possession it then was.

Whether even in such a case the gift is invalid did not arise for decision in the above case. There no portion of the property that was the subject of the gift was in possession of the donor and there could therefore be no case of delivery of a portion of the property in the possession of the donor. Further it seems to me that there is much force in the argument of the learned advocate for the appellant that in view of the later decision the Judicial Committee in *Muhammad Abdul Ghani v. Fakir Jahan Begam*¹ much of the reasoning of Abdur Rahim, J., in the above case will have to be reconsidered.

As the Judicial Committee pointed out in the above case, at the time when the Muhammadan jurists laid down the law as to delivery of possession being essential for the validity of a gift:

"There were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift."

Had the question therefore directly arisen before me, I should have felt the necessity of referring the matter to a Bench whether the decision in *Fakir Nynar Muhammad Rowther v. Kandaswami Kulathu Vandan*² can be regarded as good law after the decision of the Judicial Committee in *Muhammad Abdul Ghani v. Fakir Jahan Begam*¹. The text writers are also of opinion that *Fakir Nynar Muhammad Rowther v. Kandaswami Kulathu Vandan*² requires reconsideration. The case before me, as I have already pointed out, is quite different from that which was considered in the Madras case. If possession of the bulk of the properties was, as alleged by the appellant, actually given to the donee, I hold that the entire gift would be valid.

The question whether possession of the other properties comprised by the gift deed was actually given to the donee has not been considered. Though there is no reason to suppose that they were not delivered, yet the respondents are entitled to have a finding on that question. I therefore call upon the lower appellate Court to return a finding whether possession of the other properties covered by the gift deed was given to the donee. Fresh evidence may be adduced by both parties. Time for submission of findings two months from the date of receipt of the records by the lower appellate Court. 7 days for objections.

K.S.

Appeal allowed.

1. (1922) 43 M.L.J. 453 : L.R. 49 I.A. 195 : 2. (1911) I.L.R. 35 Mad. 120. I.L.R. 44 All. 301 at 315 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Bhimavarapu Butchi Reddi

.. Appellant*

v.

Bhartipadi Sri Lakshmi Venkata Suryaprakasarao (minor) by
mother and guardian Annapurnamma and another

.. Respondents.

Execution—Court-sale in execution of money-decree—Property subject to mortgage which, however, was represented to be sham—Suit on mortgage before court-sale—Mortgage found to be real—Sale under mortgage decree—Purchaser in execution of money-decree cannot claim refund from money decree-holder.

Certain properties subject to a mortgage were sold in court-auction in execution of a money decree. The decree-holder had represented that the mortgage was sham. The mortgagee had also brought a suit on the mortgage prior to the court-sale. The mortgage was found to be real and in execution of the mortgage decree, the mortgagee himself became the purchaser. Thereupon the purchaser at the sale in execution of the money-decree sued to recover from the money decree-holder the purchase money.

Held, that the purchaser cannot recover the money paid, for the case was not one where the judgment debtor had no interest at all in the property at the time of the auction sale, but one where the judgment-debtor had some interest, viz., the equity of redemption though it was not as valuable as the auction-purchaser thought.

Macha Koundan v. Kottara Koundan, (1935) 69 M.L.J. 750: I.L.R. 59 Mad. 202 (F.B.) distinguished. S. A. Nos. 462 and 650 of 1944 and *Izazat-un-nisa Begam v. Partab Singh*, (1909) 19 M.L.J. 682: L.R. 36 I.A. 203: I.L.R. 37 All. 583 (P.C.), referred to.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, in A. S. No. 167 of 1940, preferred against the decree of the Court of the District Munsiff, Tenali, in O. S. No. 53 of 1938.

V. Subramanyam for Appellant.

V. Parthasarathy for 1st Respondent.

The Court delivered the following

JUDGMENT.—I do not see any reason to interfere with the decree of the lower appellate Court. Two sets of properties were purchased by the plaintiff in court-auction in execution of a money decree which was obtained by the second defendant's father against one Nagi Reddi. Under the column "Details of encumbrances to which the property is liable," a registered mortgage deed was mentioned as having been executed on the 22nd June, 1930, and it was said that the mortgage was a fraudulent transaction not supported by consideration and therefore not binding. It so turned out that on the date of the court-sale the mortgagee had already filed the suit O. S. No. 108 of 1934. The court-sale at which the plaintiff became the purchaser was on the 7th May, 1934, which was subsequent to the institution of O. S. No. 108 of 1934. The plaintiff's purchase was therefore *lis pendens* and subject to the result of the mortgage suit and of the further proceedings taken therein it was the duty of the auction-purchaser to have impleaded himself in that suit and to have sought redemption if he so wanted. He did not do it. The result was that a decree was passed, the properties were brought to sale and they were purchased by the mortgagee himself. The property was thus lost. The plaintiff then filed the suit out of which this second appeal arises against the two defendants, the first defendant being the mortgagee court auction-purchaser and the second defendant the decree-holder in execution of whose decree the properties were sold and purchased by the plaintiff. As against the first defendant, the plaintiff sought a declaration that the mortgage was collusive and not supported by consideration. On the merits the trial Court found that the mortgage was not either collusive or not supported by consideration and therefore rightly refused any relief against the first defendant and the plaintiff left it at that. As against the second defendant, the decree-holder, the argument was that as the plaintiff lost the properties which were brought to sale at his instance, the plaintiff is entitled to a refund of the money that he paid for the court-sale.

This claim is one based on a decision of the Full Bench of this Court in *Macha Koundan v. Kottara Koundan*¹. The trial Court upheld the claim of the plaintiff as against the second defendant and granted a decree against the second defendant. On appeal the lower appellate Court reversed the decree. In the present second appeal though both the defendants are made respondents, relief is claimed only against the first respondent who is the second defendant in the trial Court. Mr. V. Subramaniam, the learned advocate for the appellant, argues that this case is directly covered by the Full Bench decision of this Court. Before proceeding further, it must be mentioned that six items of properties were brought to sale and that five of those items were covered by the mortgage which has been mentioned above. These items were sold as a single lot and purchased by the plaintiff. It would appear that the other item which is not the subject of the mortgage and the sale in execution of the mortgage decree was also lost as the result of a claim put forward by a third party. The appellant's learned advocate therefore says that his client has lost all the properties which were purchased by him and that therefore he is entitled to the refund of his bid amount. The facts of the case which came up for decision before the Full Bench are however entirely different and I do not agree with the contention that the decision of the Full Bench covers this case. In that case, a property which was not the property of the judgment-debtor on the date of the court-sale was put up for sale. The fact that the judgment-debtor had no title to the property even on the date of the sale was not discovered within thirty days from the date of the sale. The sale was confirmed. The auction-purchaser lost the property as a result of a later suit by a third party and he thereafter filed the suit for recovery of the amount which was paid by him for the purchase. The question was whether the auction-purchaser's remedy was not confined to an application under Order 21, rule 91, Civil Procedure Code, on the ground that the judgment-debtor had no title at all. This remedy can be availed of only if the want of title was discovered before the sale was confirmed. If the want of title is discovered after the court-sale is confirmed, then he has no remedy under the Civil Procedure Code. A right to recover the purchase-money when the mistake or want of title was discovered thereafter was provided in the Code of 1882, but that was omitted in the Code of 1908. The question was therefore whether, in a case where the judgment-debtor had no title at all on the date of the court-sale and the defect of want of title was discovered long after the court-sale was confirmed, the auction-purchaser has a right to sue for the recovery of the purchase-money. The learned Judges held that a person who purchased the property at a court-auction could, if he lost the property owing to want of title in the judgment-debtor, file a suit for recovery of the purchase-money. In the present case there was no want of title in the judgment-debtor on the date of the court-sale. He had the equity of redemption. A suit had been filed by the mortgagee, but there is no allegation in the present plaint that on the date of the court-sale at which the plaintiff purchased the property, it was not worth the amount due under the mortgage. The fact that at the subsequent court-auction held in execution of the mortgage decree there was no surplus left is not a ground for holding that on the date of court-sale at which the plaintiff purchased the property, the real value of the property did not exceed the amount due under the mortgage and costs. It is notorious that in forced sales in execution, the properties do not after all fetch even half the real value and there being no allegation in the present plaint that the real value of the property was not more than the amount due under the mortgage on the date of the purchase by the plaintiff, I decline to allow the learned advocate for the appellant to raise that question at this stage. We must proceed on the basis that there was the equity of redemption in the mortgagor and that to that extent title passed to the plaintiff. It might be that the auction-purchaser thought that he was getting a property free from any mortgage and that ultimately he found that there was a real mortgage fully supported by consideration. Further, he was informed of the

1. (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.).

mortgage and the decree-holder stated what he believed, namely, that the mortgage was collusive and not supported by consideration. No one could at that stage foretell what would be held in the mortgage action. It only meant that what was put up for sale was subjected to a mortgage which might turn out to be not binding. The purchaser must have taken this element into consideration when he offered his bid. He was purchasing the property with his eyes open and subject to the possibility of the mortgage being held valid and supported by consideration.

On the ground that some interest did pass to the plaintiff under the court-sale, I hold that the decision of the Full Bench does not apply to this case. A decision of Chandrasekhara Aiyar, J., in S. A. Nos. 462 and 650 of 1943 has been brought to my notice. There a property said to be of the extent of 4 acres and odd was put up for sale. Ultimately it was found to be only one acre and odd. The auction-purchaser filed the suit out of which the second appeal arose for the recovery of the proportionate part of the amount that he paid in the court-auction. Following the Full Bench decision, the learned Judge gave the plaintiff a decree for a proportionate part of the price which was paid by the plaintiff at the court-auction. In so doing the learned Judge has distinguished cases where the entire property was not lost and the auction-purchaser still had some interest though only a reduced interest in the property purchased by him. The learned Judge said this :

"Once it is conceded, as it ought to be, that there is a right of suit to recover money paid under these circumstances apart from the summary remedy provided for a decree-holder in the Civil Procedure Code which is confined only to cases where the sale is set aside on the ground of absence of saleable interest, it is difficult to understand why the remedy should be deemed to exist only when there is a total failure of title and not when there is a partial failure of title—partial not in the sense that the judgment-debtor had a lesser interest in the properties sold than full ownership—but in the sense that he had no title at all to a portion of the property sold."

Evidently the learned Judge draws a distinction between a case where the judgment-debtor had no title whatsoever to three acres out of the four acres sold in court-auction and a case where the judgment-debtor has still some interest though not a full absolute interest. If the property was sold as the absolute property of the judgment-debtor and it turns out that the judgment-debtor had only a life interest or a lessee's interest or only the equity of redemption, no suit would lie. The present case is covered by the exception which the learned Judge recognised in this judgment.

There are weighty considerations for reconsidering the Full Bench and these have been discussed in a decision of this Court in Appeal No. 90 of 1942. I hold that the principle of the Full Bench judgment must not be extended and that it should be applied only to a case where the judgment-debtor had no interest *at all at the time when the court-auction was held* and not to a case where the judgment-debtor had some interest, whether that interest is as valuable as the auction-purchaser thought or otherwise. In *Izzat-un-nisa Begam v. Partab Singh*¹, the Judicial Committee held that where property was sold in a court-auction expressly subject to a mortgage and it was later on found that the mortgage was unenforceable for some reason and the auction-purchaser got the property free of the encumbrance, the purchaser cannot be ordered to pay the amount of the mortgage. If in such a case the auction-purchaser is entitled to the benefit of the amount of the mortgage subject to which he purchased the property, then in the converse case where the property was sold with the remark that the mortgage on the property was collusive and not supported by consideration and it ultimately turned out that it was supported by consideration, the auction-purchaser ought to bear the loss. I do not see any distinction of substance between the case before me and the case before the Judicial Committee.

I dismiss the second appeal. I leave the parties to bear their own costs in this second appeal. (No leave.)

V.P.S.

Appeal dismissed.

1. (1909) 19 M.L.J. 682 ; L.R. 36 I.A. 203 ; I.L.R. 31 All. 583 (P.C.).

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Calcutta.)

PRESENT :—VISCOUNT MAUGHAM, LORD MACMILLAN AND LORD WRIGHT.
Bank of Baroda, Ltd. *Appellant**

v.

Punjab National Bank, Ltd. and others *Respondents.*

Negotiable Instruments Act (XXVI of 1881), section 7—Cheque—Marking or certification by drawee bank—If constitutes acceptance—Practice in regard to—Calcutta Clearing Banks Association Rules, Rule 12—Effect—Law Merchant—Admissibility of evidence as to custom and usage—Alternative claim apart from statute—Determination—Principles—Post-dated cheque and its certification—Validity—Post-dated cheque certified by drawee bank deposited in payee's bank—Latter refused payment by former on due date—Right of payee's bank to recover as holders for value under the statute or custom or usage or on the contract contained in the certification.

Marking or certification of a cheque by the drawee bank as "good for payment on" a future date is not acceptance within the meaning of the English Bills of Exchange Act or Negotiable Instruments Act or the common law.

In practice, cheques are not accepted. Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. As between the drawer and his bank, acceptance of a cheque is superfluous.

Even in jurisdictions in which either by statute or by custom certification is declared to be "equivalent" to an acceptance, it is different, both in its history and its effects from acceptance.

But it is different in England and in India where the practice of marking cheques has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance. In the absence of relevant enactment or custom, the issue in England and India as to the effect of the certification of a cheque must be determined by the common law.

That practice is in Calcutta, the subject of rule 12 of the new Regulations and Rules of the Calcutta Banks Association. The certification under such a practice cannot however be identified with an acceptance.

Without saying that a cheque could never be accepted, it could be said that it is only done in very unusual or special circumstances. It would certainly require strong and unmistakable words to amount to the acceptance of a cheque. If what could not be predicated of a certificate, it cannot be regarded as an acceptance unless a custom could be established to treat it as such.

The Negotiable Instruments Act and the English Bills of Exchange Act have both been based on the law developed by the English Courts as a part of the law merchant, which the common law originally received on the basis of what was proved to the Court to be the custom of European businessmen in their dealings, but which eventually, under the name of the law merchant was integrated with and became a part of the common law. But the law merchant is not a closed book nor is it fixed or stereotyped. Evidence is admitted of custom and usage which when judicially ascertained and established, become incorporated in the common law. Hence a party who contends that a certification is an acceptance under the statute may also base his claim on custom or usage or alternatively on contract or estoppel created by or arising out of the actual words of the certification. The certification must for such a purpose be construed according to the proper meaning of the words used in their setting and independently of the doctrine of negotiability, which is the creation of legislation or established usage.

A post-dated cheque is not invalid either in England or in India by reason only that it is post-dated. Certification of a cheque may have operative effect and be valid as being directed to a cheque due *in praesenti*, such certification being presumably followed by debiting the drawer's account with that amount. But it would be anomalous or invalid when it is attempted to apply certification to a cheque before it is due.

G and M were constituents of the appellant bank at its branch in Calcutta. M whose account with the Calcutta branch of the respondent bank was heavily overdrawn paid into his account with that bank on the 13th June, 1939, a cheque drawn by G on the appellant bank in favour of M, which was crossed " & Co.," and on the face of which were written crosswise the words "marked good for payment on the 20th June, 1939" and signed by the manager of the appellant bank. M requested for an overdraft which along with the prior overdrawn amounts would equal the amount for which the cheque was drawn. The respondent bank granted the overdraft and debited it accordingly to M's account. When on 20th June, the respondent bank presented the cheque to the appellant bank for payment and it was refused as it had not been arranged for, it sued the appellant bank as also G and M claiming as against the appellant bank as holders for value of the certified cheque and also based their claim on custom or usage, and in the alternative on estoppel.

Held, that the certification did not constitute acceptance under the Negotiable Instruments Act, nor was the language used so strong and unmistakable as to amount to acceptance of the cheque. In the circumstances there was nothing in the evidence to justify the finding of a custom to identify certification with acceptance and the alternative claim in contract or on an estoppel also failed and hence the appellant bank was not in any way liable.

Sir T. Strangman K. C. and J. M. Pringle for Appellant.

D. N. Pritt K. C. and S. A. Kyffin for Respondents.

Their Lordships' Judgment was delivered by

LORD WRIGHT.—The appellant is a company doing banking business, established in the State of Baroda, under the Baroda Companies Act, 1896-97, and having its registered office in Baroda with branches in British India. The respondent is a bank incorporated under the Indian Companies Act. Both banks have branches in Calcutta. M. P. Amin was manager of the Calcutta branch of the appellant bank. Bhagwan Das was manager of the Calcutta branch of the respondent bank. One Mitter (respondent 2) became a customer of the appellant bank at Calcutta. In May 1939, one Ghose (respondent 3) opened an account with the appellant bank on the understanding that he should be allowed "temporary accommodation from time to time." That account was guaranteed by Mitter. On 13th June, 1939, Ghose's account with the appellant bank showed an opening debit balance of Rs. 1,26,339 reduced during the course of the day to Rs. 89,274. On the same date Mitter's account with the respondent bank was overdrawn to the extent of about Rs. 35,000. On that day, Mitter brought to the respondent bank two cheques drawn by Ghose on the appellant bank both in favour of Mitter and both dated 13th June, 1939; both cheques were marked on their face with the words "Marked good for payment up to 20th June, 1939," and signed by Amin on behalf of the appellant bank. One cheque was for Rs. 1,40,000 and the other for Rs. 1,35,000. Mitter informed Bhagwan Das that the cheques would not be paid until 20th June, 1939, and asked to be allowed to draw Rs. 2,40,000 against them. Bhagwan Das said he wanted a cheque the date of which was the same as that on which payment was to be made. Mitter then took away the cheques and returned a little later on the same day with one cheque dated 20th June, 1939, drawn by Ghose on the appellant bank in favour of Mitter or order, for Rs. 2,75,000. The cheque was crossed "& Co." and on the face of it were written crosswise the words "Marked good for payment on 20th June, 1939. For the Bank of Baroda, Limited, M. P. Amin, Manager." It has not been questioned that the signature was that of Amin. Mitter endorsed the cheque generally and handed it to Bhagwan Das, with two letters, in which he asked the respondent bank to credit Rs. 2,75,000 to his account "on realisation on due date," and also requested an overdraft of Rs. 2,40,000 besides the previous balance, which he promised to adjust on 20th June, 1939.

The respondent bank on the same day gave Mitter its cheque for Rs. 2,40,000 on the Imperial Bank of India at Calcutta which Mitter duly cashed. The respondent bank debited Mitter's account with the amount. Meantime the appellant bank had become suspicious of the conduct of Amin and had sent two senior officials to keep Amin under observation. On 19th June, Amin was suspended and early next day a notice was sent to the respondent and other banks that Amin's power of attorney had been cancelled and another branch manager appointed. On 20th June, the respondent bank, who, though they had not yet received the notice, had become apprehensive, sent their cashier and their accountant to the appellant bank, as soon as it opened for business that morning, to present the cheque marked as above which Bhagwan Das had endorsed generally for Rs. 2,75,000, over the counter for payment. Ghose's account was then in credit to the extent of annas 7 pies 3 only. The appellant bank refused payment and returned the cheque with a memorandum attached "not arranged for." After some correspondence the respondent bank on 31st July, 1939, commenced the present suit against the appellant bank, and also against Mitter and Ghose. As against the appellant bank, the respondents claimed as holders for value of the certified cheque, and also based

their claim on a custom or usage, and in the alternative on estoppel. They claimed against Ghose as drawer and against Mitter as endorser. The two latter did not appear, nor did they give evidence at the trial; indeed they were then the subject, along with Amin, of criminal proceedings in connection with their part in the affair. It was not suggested that either Bhagwan Das or the respondent bank were actually party or privy to the fraud, however irregular from a banking point of view was the discounting of a post-dated cheque, quite apart from the original request to have a single cheque in place of the two brought in the first instance. It does not appear whether the cheque was post-dated at the request of the drawer, Ghose or of Mitter. It seems that the amount of the cheque was not debited to Ghose's account and that there was no earmarking of funds or cover for it. Ghose's account, as already observed, was heavily overdrawn when the cheque was taken as security for the loan. It may be said that the respondent bank was not affected by irregularities of indoor management on the part of the appellant bank's manager, of which they had no notice, but the fact that money was lent on the post-dated cheque on 13th June, though on its face it was only payable on 20th June, and was marked for payment on that date, was a departure obvious on the face of the cheque from any practice there might be in these matters. The respondent bank however made no inquiries, and did not question the validity of the certification or marking. The effect of this will be considered later.

At the trial before Panckridge, J., the evidence called included some Calcutta bankers, who deposed on the question of there being a practice in Calcutta to mark or certify cheques, but it is clear that on any view there was no satisfactory evidence that it was usual to certify post-dated cheques. Panckridge, J., held the appellant bank liable on the cheque on the ground that they were acceptors because in his judgment the certification constituted an acceptance within the meaning of the Negotiable Instruments Act, though he went on to hold as a further ground that the evidence showed that bankers at Calcutta are by usage liable on cheques certified by them when presented by parties entitled thereto. He did not deal specifically with the case that the cheques were post-dated.

On appeal the judgment of the trial Judge was affirmed. The Chief Justice who delivered the judgment of the Court decided the case on the ground that the marking or acceptance of the cheque was in law an acceptance by the appellant bank, and accordingly the question of usage did not arise. He said however that the evidence was insufficient to enable him to hold that the custom alleged was established. He was prepared to consider the evidence as showing that banks in Calcutta which mark cheques regard the certification as an acceptance which makes them legally liable to pay and that they honour their obligation. The Chief Justice did not deal at length with the objections to certifying post-dated cheques, though in the memorandum of appeal it was expressly urged that to certify a post-dated cheque was outside the manager's authority and was outside any custom or usage.

In the Court below the pleadings and issues were not very precise or formal, and before this Board the appeal has been presented and argued on the basis of the substantial issues.

The first and principal issue was whether the certification amounted to an acceptance within the definition contained in section 7, Negotiable Instruments Act, 1881, which defines an acceptor as the drawee of a bill of exchange who has signed his assent upon the bill, and delivered the same. By section 6 a cheque is defined as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

There is no provision in the Negotiable Instruments Act as to a post-dated instrument such as there is in the English Bills of Exchange Act, 1882, section 13 (2), which says that a bill is not invalid by reason only that it is ante-dated or post-dated. There are certain differences between the English Act and the Indian Act, which preceded the former by a year. But substantially the two Acts correspond. Both have been based on the law developed by the English Courts as a part of the law-merchant, which the common law originally received on the basis of what was

proved to the Court to be the custom of European businessmen in their dealings, but which eventually, under the name of the law-merchant was integrated with and became a part of the common law. The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal. Hence the English Act was described as a codifying Act, and so was in fact the Indian Act. Both were based on the English decisions and hence these and later decisions of either country are commonly cited and relied upon. And in addition decisions from other common law jurisdiction are frequently cited as in the present case is done by the Chief Justice. But the law-merchant is not a closed book nor is it fixed or stereotyped. This was explained by Cockburn, C.J., in *Goodwin v. Roberts*¹. Practices of business men change, and Courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence evidence is admitted of custom and usage, which when juridically ascertained and established become incorporated in the common law. Thus, in the present case, there is an alternative claim based on custom and usage. But the contention that the certification was an acceptance of the cheque is primarily a question of law, to be decided on the terms of the Act and on the authorities upon a correct understanding of the characteristics of a cheque and of the effect of certification.

The main question falls into two parts : one is whether it is legally competent to accept a cheque as if it were a bill within section 7, Negotiable Instruments Act, 1881, and the other is whether certification constitutes an acceptance. Now it is to be noted that so far as their Lordships know there is no case in the books of the acceptance of a cheque. This is an arresting fact at the outset, especially when the myriad cheques which have been drawn and paid during all these years are considered. The reason why a contrast is drawn between the acceptance of a cheque which is a bill of exchange of a special type and the acceptance of an ordinary bill of exchange depends on the distinction in fact between a bill of exchange and a cheque, which are in many respects different and distinct in their character and origin : see *Goodwin v. Roberts*,¹ though in many respects they are analogous. In *Ramchurn Mullick v. Luchmeekund Radakissen*² this Board on an appeal from the Supreme Court of Calcutta in a judgment delivered in 1854 by Parke, B., pointed out some of the essential differences : he said that a cheque is a peculiar sort of instrument, in many ways resembling a bill of exchange, but in some entirely different. He said that in the ordinary course it is never accepted : it is not intended for circulation, it is given for immediate payment, it is not entitled to days of grace. In addition, it is to be noted, a cheque is presented for payment, whereas a bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance ; this is not so in the case of a cheque, because the holder of a cheque, as between himself and the drawer, has no right to require acceptance. These essential differences (besides others) are sufficient to explain why in practice cheques are not accepted. Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular if the customer has sufficient funds or credit available with the bank the bank is bound either to pay the cheque or dishonour it at once. There is no point in its saying in effect to the drawer or indeed to the holder if it has been transferred, "I will pay if you present it again." It is different in the case of an ordinary bill ; the drawee is under no liability on the instrument until he accepts ; his liability on the bill depends on his acceptance of it. As between the drawer and his bank, acceptance of a cheque is superfluous. It would be merely a confirmation of the contractual liability of the bank to honour the customer's orders to pay. The customer's right to draw a cheque depends on his having satisfied the contractual conditions which require

1. (1875) 10 Ex. 337 at 346 and following pages. 2. (1854) 9 Moo.P.C. 46 at 69.

the bank to honour his mandate to pay the cheque. But if the bank (at least at the drawer's request), accepts the cheque, he should be entitled to protect himself as against his customer by setting aside the appropriate funds standing to the customer's credit. The change in the position of all parties which would follow on the acceptance of a cheque if regarded as an acceptance under the Act has led the highest English authorities to lay it down that cheques are not the proper subject of acceptance, or at least to say, as Chalmers stated at p. 292 of edn. 10 of the Bills of Exchange Act, that "a cheque is not intended to be accepted," though he adds "at common law there is no objection to the acceptance of a cheque if the holder likes to take it in lieu of payment." These latter words emphasise the difference for this purpose between a bill and a cheque, and also explain why cheques are not in practice accepted. In *Macbeth v. N. & S. Wales Bank*¹, Lord Alverstone, L.C.J., said: "In ordinary parlance there is no acceptor of a cheque." It seems that on special occasions bankers do accept cheques drawn on themselves so as to make them payable at one of their clearing bankers, they themselves not being members of the Bankers' Clearing House, but this is rare and exceptional. Both Chalmers (*loc. cit.*) and Paget, on Banking, edn. 4, p. 164, are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the Court in *Robson v. Bennet*². That is a practice between bankers for the purpose of clearing. It was judicially recognised by Cockburn, C.J., in *Goodwin v. Roberts*³ in these words:

"A custom has grown up among bankers themselves of marking cheques as good for payment for the purposes of clearance by which they become bound to each other."

This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of rule 12 of the new Regulations and Rules of the Calcutta Clearing Banks Association, which are exhibited in the documents of this case. Rule 12 says:

"It shall be permissible for any member or sub-member in the intervals of clearing hours, to apply for the 'acceptance' of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of 'acceptance' of the document."

It is to be noted that though it uses the term "acceptance" it puts it in inverted commas, so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot however be identified with an acceptance. In the United States, the practice of marking or certifying cheques has been established and defined by the different state Legislatures in the Uniform Negotiable Instruments Acts. It is presumably this law, as enacted in New York State in 1897, to which the Chief Justice refers in his judgment. The same measure, with trifling variations, has since been made law in the other States of the Union. Their Lordships must therefore briefly advert to this law, which gives a statutory recognition to the certification of cheques. Section 187 of the Uniform Act provides that

"where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance."

It does not say that the certification is an acceptance, which is dealt with in a different part of the Act. The whole position is indeed materially different, as is clear from section 188, which goes on to define the effect of certification in the following terms:

1. (1908) 1 K.B. 13 at 18.

2. (1810) 2 Taunt 388.

3. (1875) 10 Ex. 337 at 351.

"Where the holder of a check procures it to be accepted or certified the drawer and all endorsers are discharged from liability thereon."

These sections have led to a great deal of judicial discussion in the Courts of the United States, the effect of which is summarised in the standard work of Brannan, *Negotiable Instruments Law*, edn. 6, page 1146, *et seq.* These discussions also show that certification and acceptance are different things under the Act. Certification makes the banker the debtor of the holder, and discharges the drawer altogether if the certification is not made by his procurement. Certification adds a new party, the bank, as primary debtor, and necessarily involves readjusting the legal position of the original parties, drawer and payee. A similar rule has been adopted, it seems by the Courts of Canada on the basis of the custom in Canada judicially recognised by this Board in *Gaden v. Newfoundland Savings Bank*¹. The custom was stated at page 285 to be that

"the only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it was drawn."

These last words are not very precise and their exact effect has not been argued in this appeal. It is not here necessary or proper for their Lordships to attempt to follow in detail the Canadian authorities on this topic. Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be "equivalent" to an acceptance. But it is different in England and India, where the marking of a cheque has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance. In the absence of relevant enactment or custom, the issue in England and India as to the effect of the certification of a cheque must be determined by the common law.

Their Lordships are of opinion that the certification which is relied on as constituting acceptance of the cheque is not an acceptance within the meaning of the English or Indian Act or the common law. It is not necessary categorically to hold that a cheque can never be accepted; it is enough to say that it is only done in very unusual and special circumstances. The authority which has been strongly founded upon by the respondent is a case in *Robson v. Bennett*², where the practice already mentioned of London bankers to mark cheques presented after banking hours by one banker drawn on another in order to show that the drawer had assets and to show that they would be paid next day at the clearing house, came incidentally into question. The real issue was whether the holder had become bound, as between himself and the drawer, to treat the cheque as good payment of the debt for which it had been given; the facts were that the drawee bank had stopped payment the next morning, so that the cheque was not actually paid. The drawer claimed that the holder was bound to treat the cheque as payment because he had been guilty of laches in not presenting the cheque within banking hours on the day on which it was given. In that event the drawee bank, which had not then stopped payment, would have met the cheque because the drawer's account was sufficiently in credit. The Court of Common Pleas rejected this contention, and held that there had been no laches on the part of the holder and that by reason of the practice of bankers the actual presentment which had been made was in good time. Sir James Mansfield, C.J., in giving judgment, used the phrase that "the effect of that marking is similar to the accepting of a bill." That was a mere dictum not necessary, or indeed relevant, to the decision of the case; the banker was not even a party to the action. Having regard to the custom stated by Cockburn, C.J., in *Goodwin v. Roberts*³, quoted above, and the whole tenor of English authority, their Lordships are of opinion that the dictum cannot be justified in English or Indian law. In *Keene v. Beard*⁴, the question was whether the holder of a cheque could sue the endorser on his endorsement.

1. (1899) A.C. 281.

2. (1810) 2 Taunt 388.

3. (1875) 10 Ex. 337.

4. (1868) 8 C.B.N.S. 372.

It was held that he could. No question arose as to the acceptance of a cheque, but Erle, C.J., in the course of his judgment, observed :

"A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker, and though in practice the banker does not accept the draft, he might for aught I know do so." Further instances of incidental observations to the same effect or similar observations in well-known text-writers need not be quoted. Their Lordships repeat that no case is reported in England or India so far as they are aware, of a banker being held liable or even sued as acceptor of a cheque drawn upon him. It would certainly require strong and unmistakable words to amount to the acceptance of a cheque. That cannot be predicated of the certification here in question, which cannot, therefore, be regarded as an acceptance unless a custom could be established to treat certifications as acceptances. If the respondent were entitled to claim against the appellant as on an acceptance of the cheque, there would be no defence, unless on the point that the cheque was post-dated. This problem their Lordships will consider later. If that point is for the moment disregarded the respondent's claim may however be put forward in default of it being held that there was an acceptance of the cheque on the ground that there is a custom which makes the appellant liable, or alternatively on the ground that by common law, apart from special custom, the respondent can claim either in contract or on an estoppel upon the actual words used in the certification. The Chief Justice, having held that the certification constituted an acceptance, went on to say that the question of usage accordingly did not arise. He added that :

"Before agreeing with the learned Judge that a usage such as he mentions had been established, I should require further evidence . . . I prefer to regard the evidence as showing that banks in Calcutta, which certify and mark cheques, regard the certification or marking as being an acceptance which makes them legally liable to pay the amount thereof and that they honour their obligations."

Their Lordships do not regard these two sentences as necessarily inconsistent. The latter seems to them merely to state that the general habit of business men supports the Chief Justice's decision that in law there was an acceptance. It cannot be intended to substitute a sentiment that banks ought to honour their signature whether in law binding or not, for the correct legal position when a bank feels entitled or bound to rely on the strict letter of the law and the Court is required to decide strictly the legal rights. Their Lordships agreeing with his decision that the evidence of custom is insufficient, as they think it is both in the number and quality of the witnesses and in the certainty and precision of the evidence given, cannot, in view of the decision which he had previously expressed on the issue of custom, treat the sentence as intended to find a legally binding custom. There is indeed in the evidence no instance spoken to of a dispute being settled in favour of the alleged custom ; the instances given are comparatively few and from a few banks, and are mainly instances of the limited custom of bankers in the clearance, which is not questioned. In some cases given in evidence the periods between certification and clearance extend over the week-end, and in one instance at least even a few days longer. They can, it seems, be most properly regarded as instances of occasional laxity. But there is nothing to justify the finding of a custom to identify certification with acceptance.

In one essential matter, however, the evidence is not merely too weak to support a custom, but is directly opposed to it. The cheque in question was post-dated. Post-dated cheques are a peculiar species, which have been described as objectionable. The general tenor of the evidence as to them in this case is that it is at the lowest unusual to certify post-dated cheques, indeed that it is almost unknown. Bhagwan Das said that he had never certified a post-dated cheque. As to the actual certification on the particular cheque in question, he said that he took it as a representation that the appellant bank would meet the cheque on a future date, and he said he would feel no difficulty in marking a post-dated cheque, though he did not directly answer the question whether it was usual to do so, but merely said "there is no harm," and later that it was done in rare cases. He also said that this was the only instance in which while at Calcutta he had advanced

money on a post-dated cheque. His view of the law was that by marking or certifying the cheque, they became in a way the drawers of it. Another of the respondent's witnesses said that he did not think he had certified a post-dated cheque or accepted (that is taken) a post-dated cheque certified by another bank. But he expressed his view that if he certified the cheque his bank would be liable. Another witness called by the respondent said that it was not usual to certify a post-dated cheque, though in answer to a leading question on re-examination, he agreed that a bank was bound to pay a certified post-dated cheque. Another of the respondent's witnesses said that he would not discount a certified post-dated cheque; he would feel there was something suspicious in the transaction and would make enquiry. The appellant was content in the main to point out the inadequacy of the respondent's evidence.

In their Lordships' judgment, the evidence of custom fails as the Chief Justice held. As to the alternative claim in contract or on an estoppel, that claim in their judgment also fails. The certification must for this purpose be construed according to the proper meaning of the words used in their setting and independently of the doctrine of negotiability, which is the creation of legislation or established usage. If legislation or usage is ruled out, as in this case it must be, the question is whether the words read in their context, that is, as appearing on a cheque, import a promise by the certifying bank to pay the amount of the cheque whether or not there are funds to meet it, and if they do, whether there is any privity of contract between the respondent and the appellant, and if there is whether there is consideration for the promise as between these parties. If the certification on the cheque had been negotiable, as an acceptance in the proper sense would have been, the respondent bank would *prima facie* have been entitled to claim as a holder in due course, having given value to its immediate transferor, and would not be concerned with the state of accounts or the equities between the appellant bank and Ghose or Mitter, to one or both of whom the certification was issued. But this is not the case unless the certification amounted not merely to a promise but a negotiable promise by the appellant. The respondent bank must show privity of contract between itself and the appellant bank whereas there was privity of contract only as between the appellant bank and either Ghose or Mitter or perhaps both. The respondent bank claims as a holder in due course, and must so claim. If it claimed as assignee or agent for collection, it would have no better title than its assignor or principal. But in addition there clearly was no consideration passing to the appellant from the respondent. There was thus no enforceable contract, even if the certification could be construed according to its terms as a contract to pay. Their Lordships doubt whether, on this ground, no custom being established, the words of the certification could be so construed. They might be construed as words of representation, as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But as the cheque was not due for payment until seven days later, a representation as to the then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise and the want of consideration would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise given either to Ghose or Mitter or to both to lend the money when the 20th came. Their Lordships adopt the language of Buckley, J., used in a different context in *In re Beaumont*¹ at p. 896 :

"No right had been acquired by the drawer but an expectation only. Even if the manager did not change his mind, still any agreement to lend is not enforceable and no right of property had passed to the drawee."

What was in question there was a *donatio mortis causa* of a cheque which the manager of the bank had said would be met. But the principle stated has an application to the certification here. What was said could have been revoked or disowned.

It was not binding; there was no appropriation of funds or declaration of trust involved in the certification, because there were in fact no funds available on the 13th or indeed the 20th. Nor could the certification be construed as an estoppel on which the respondent could claim on the doctrine of *Pickard v. Sears*¹ and *Jorden v. Money*², because that doctrine is limited to a representation as to an existing fact, whereas not only were no funds available, but what is called the representation related to the future. Even if funds had been available and had been "frozen," the bank would be entitled to release them before the 20th in the absence of a binding promise to maintain them. It was only to the position in the future when the time for payment arrived that the certification had reference, and whatever language was used, it necessarily amounted if it was to be effective, to a promise or nothing. From the point of view of a Court of law, a gentlemen's agreement or honourable obligation, however important in business, has no validity.

But behind all these considerations lies the circumstance that the cheque was post-dated. The question of certifying a post-dated cheque has been adjudicated upon in the United States. It has there been held there is no authority implied by law for an officer of a bank to certify a cheque until on or after the date when it is made payable and that anyone taking a post-dated cheque before the day of its date is put upon enquiry. As to this reference may be made to Brannan *op. cit.* p. 1152. There do not seem to be any English cases on the point, presumably because the practice of certifying cheques is not judicially, or legislatively established in England and the same is true of India. It was however held in *Forster v. Mackreth*³, that a partner had no authority to bind his firm who were solicitors by a post-dated cheque any more than he had authority to bind the firm by a bill of exchange. No doubt, the reason for denying ostensible authority is in some aspects different in the one case from that in the other. But in each case, it depends on the nature and normal exigencies of the business, and a banker's business does not normally involve that a manager's authority should extend to certifying and still less making a loan against a post-dated cheque. The Chief Justice deals shortly with the difficulty by holding that the post-dated cheque was in law a bill of exchange at seven days' date, which on 20th June became a bill of exchange payable on demand and therefore a cheque. But the material date in this context is that of the certification, issued when the bill or cheque was not due. A post-dated bill is under the English Act, section 13 (2), not invalid by reason only that it is post dated. There is no similar provision in the Indian Act, but the same result would, it seems, follow from the common law and the position of a post-dated cheque is recognised in the Indian Stamp Act. But the material invalidity is that of the certification, taken in connexion with the fact that the cheque was post-dated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due *in presenti*, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdictions where, by law or custom, certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of post-dated cheques and that in the present case, the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

1. (1837) 6 Ad. & El. 469.

2. (1854) 5 H.L.C. 185.

3. (1867) 2 Ex. 163.

Their Lordships are not unconscious that bankers regard their word as their bond, and honour their signature even though they might have an answer in law. This is especially true as between banker and banker. Bankers would say that the bank making the mistake or whatever it was should stand by its act. But in circumstances such as those of the present case, the mistake in certifying the cheque would have done no harm, if it had not been for the act of the other banker in discounting it, though the defect was apparent on its face. A lawyer would be disposed to hold that the responsibility lay with the latter bank. In any case the Court is here called upon to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken. On the whole case their Lordships are of opinion that the action of the respondent should fail. They think that the appeal should succeed and the judgment for the respondent should be set aside, and the action dismissed with the costs in the Courts below and of the appeal. They will humbly so advise His Majesty.

Solicitors for Appellant : *Sanderson, Lee & Co.*

Solicitors for Respondents : *Douglas Grant and Dold.*

V.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Cherukuri Ramakrishniah

.. *Petitioner**

v. .

Sri Krushi Vidyalyaya Sangam, Oleru, represented by its Secretary

Unnava Chimpayya

.. *Respondent.*

Transfer of Property Act (IV of 1908), section 83—Scope—Mortgagor depositing amount in Court—Amount not according to the bond—Inquiry as to the sum due under the section not open.

There is no provision in section 83 of the Transfer of Property Act for an inquiry as to the sum due by the mortgagor to the mortgagee. Such an enquiry is beyond the scope of section 83, because the Court has not to give any finding on any question.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tenali dated 17th July 1943 and made in O. P. No. 3 of 1943.

G. Venkatarama Sastri for Petitioner.

T. G. Krishnamurthi for Respondent.

The Court delivered the following

JUDGMENT.—This petition has been filed by a mortgagor against an order dismissing his application under section 83 of the Transfer of Property Act to direct the mortgagee to receive a certain sum of money deposited by him in full satisfaction of the mortgage debt and to return the mortgage bond.

It is admitted by the petitioner that he did not deposit the amount due on the face of the mortgage bond. He contended that the interest was penal and should not have been more than a certain lower rate and that according to the lower rate only the sum of money deposited by him was due. According to the provisions of section 83, notice went to the mortgagee, who declared his unwillingness to accept the money deposited by the petitioner in full discharge of the mortgage debt and stated that the amount due to him was what was due on the face of the document. As the mortgagee had refused to receive the sum tendered, there was nothing more that the lower Court could do. There is no provision in section 83 for an enquiry as to the sum due by the mortgagor to the mortgagee. The mortgagor makes the tender and the mortgagee has to say whether he accepts the sum in full discharge of the mortgage or not. The lower Court considered that it was entitled to go into the question whether the interest was penal or not and relied upon *Narayanaswami Nayak v. Ramaswami Nayak*¹. Although the question is there stated whether the

* C. R. P. No. 1580 of 1943.

15th August, 1944.

Court can consider whether the amount tendered is the sum due on the mortgage bond or not, there is no discussion by the learned Judge; because the matter came before him in second appeal, where the question had to be decided whether the sum tendered was correct or not. The learned Judge did not anywhere in his judgment say that such an enquiry was within the scope of section 83 of the Transfer of Property Act. It seems clear to me that such an enquiry is beyond the scope of section 83; because the Court has not to give any finding at all on any question. This question will have to be decided in later proceedings, just as it was in the matter before Venkataramana Rao, J., in *Narayanaswami Nayak v. Ramaswami Nayak*¹.

The learned advocate for the petitioner contends that the lower Court should not have dismissed his application, but should have noted that he had registered the deposit of the petitioner. As however the petitioner asked for various reliefs which could not be granted to him, I do not think that he has any cause for complaint because the lower Court dismissed his application. If he wishes the deposit to remain in Court, it will of course remain in Court deposit; for the lower Court has no power to compel the petitioner to take back his money if he does not wish to do so.

The petition is dismissed with costs.

K.C.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Patnala Ramalakshmi and others

.. *Petitioners**

v.

Dowlatabad Gopalakrishna Rao

.. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 13—Scope—Promissory note of 11th April, 1938, carrying interest at 12 3/8 per cent.—Payments and appropriations towards accrued interest at the contract rate —Re-appropriation to total of principal and interest at 6 1/4 per cent. under section 13—Not permissible.

Towards a promissory note dated 11th April, 1938, carrying interest at 12 3/8 per cent. there was a series of payments of interest expressly appropriated by endorsements with the result that all the interest was paid at the contract rate up to 11th August, 1941. In a suit on the note for the principal together with interest at the contract rate from 10th August, 1941, the debtor claimed relief under section 13 of Madras Act IV of 1938, and the lower Court scaled down the debt by the process of calculating the total amount of principal and interest at the statutory rate of 6 1/4 per cent. and deducting therefrom the payments made. On revision,

Held, the payments having been made and appropriated to interest at the contract rate under a mistake of law cannot be got back and re-appropriated towards the principal so as to make the whole of the accrued interest amenable to the process contemplated under section 13 of Madras Act IV of 1938.

Unreported decision in A. A. O. No. 387 of 1942, applied.

There is no provision under section 13 for the scaling down of interest already paid.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Coacanada dated 11th January, 1943, and passed in Small Cause Suit No. 70 of 1942.

V. Parthasarathi for Petitioners.

K. Mangachari for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—The plaintiff filed a small cause suit on a promissory note dated 11th April, 1938, for a sum of Rs. 300 carrying interest at 12 3/8 per cent. There was a series of payments of interest expressly appropriated by endorsements. The result was that all the interest was paid at the contract rate up to 11th August, 1941. The plaintiff sued for the principal amount of the note together with interest at the contract rate from 10th August, 1941. The lower Court has held that the debtor is entitled to relief under section 13 of the Madras Act IV of 1938 and has

scaled down the debt by the process of calculating the total amount of principal and interest at the statutory rate and deducting therefrom the payments made, ignoring the fact that these payments have been actually appropriated as they were made towards interest at the contract rate.

We do not consider that the procedure of the learned Subordinate Judge is justifiable. Under section 13 it is provided that,

"In any proceeding for recovery of a debt, the Court shall scale down all interest due on any debt incurred by an agriculturist after the commencement of this Act, so as not to exceed a sum calculated at 6 1/4 per cent."

There is no provision for the scaling down of interest already paid. We had to deal with a similar question in an unreported case, A. A. O. No. 387 of 1942. There, the debt was a mortgage of 1st June, 1932, towards which a payment of Rs. 6,000 was made on 11th August, 1940, towards interest which had then accrued at the contract rate, without taking into consideration the reduction of that interest which might have been claimed under Act IV of 1938. We observed that the payment towards the accrued interest must be deemed to be an overpayment made owing to a mistake of law. We go on to say :

"It is well established that a payment made under a mistake of law cannot ordinarily be recovered through the Courts. Had there been in the present case no principal outstanding after the date on which this payment was made, the excess payment towards interest could not have been recovered. It seems to us to follow that the excess payment towards interest cannot be taken back by the debtors and repaid towards the principal. To allow the debtors to make such a reappropriation to the detriment of the creditor, would in fact be to recognise their right to get the excess amount back at their disposal so that they can re-allot it to a different fund. The principle enunciated above is well established, and a case coming very near to the facts of the present case is the case of *Sharp Brothees and Knight v. Chant*."

The same principle applies in the present case. These payments having been made and appropriated to interest at the contract rate under a mistake of law cannot be got back and reappropriated towards the principal, so as to make the whole of the accrued interest amenable to the process contemplated under section 13.

The civil revision petition is allowed and the plaintiff will have a decree for Rs. 300 with interest at 6 1/4 per cent. from 11th August, 1941, till to-day ; proportionate costs in the lower Court, full costs in this Court and subsequent interest at 6 per cent.

K.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Amichand Doss Dwarkadoss

*Appellant**

v.

T. Manavedan Tirumalpad, Rajah of Nilambur and others *Respondents.*

Limitation Act (IX of 1908), Articles 36 and 120—Applicability—Misleading prospectus—Suit for compensation by subscriber—Action in tort independent of contract—Time-limit.

There is no Article in the Limitation Act which specially provides for actions against a promoter or director of a company in respect of a false statement made in a prospectus. A person who is responsible for the issue of a false prospectus commit a tort and by reason of the provisions of section 100 of the Indian Companies Act is under a statutory liability to provide compensation. Article 36 and not Article 120 of the Limitation Act will therefore apply to an action against the directors of a company for compensation for loss suffered as the result of a misleading prospectus. In such a case the tort is independent of the contract as the liability of the directors is confined to something which preceded the contract.

Appeal under clause 15 of the Letters Patent against the judgment of Kunhi Raman, J., dated 25th October, 1943 and passed in C. C. C. A. No. 54 of 1942, preferred against the decree of the City Civil Court, Madras (Principal Judge), dated 24th September, 1942, and passed in O. S. No. 3104 of 1939.

[The judgment of Kunhi Raman, J., under appeal, was as follows :—This appeal is from the decision of the City Civil Court, Madras, in O. S. No. 3104 of 1939. The second

defendant is the appellant. The facts are interesting and may be briefly stated. Defendants 2 to 7 are the directors of the first defendant company which was floated by them and which has now ceased to exist. The plaintiff applied for 250 shares in the newly formed company on seeing the prospectus published in a newspaper in Madras. As required by the rules, he paid Rs. 500 in cash along with his application. The shares applied for were allotted to him. He filed the suit from which this appeal arises for rescission of his contract with the first defendant company known as the Cochin Furniture Co., Ltd., and for Rs. 500 which he claimed as damages from defendants 2 to 7 the directors of the company on the ground that in the prospectus that was published there were misleading or untrue representations which deceived him and made him part with cash. In the course of the trial, the suit was withdrawn as against the first defendant company and therefore the decision of the suit turned upon the question as to whether the directors of the company—defendants 2 to 7—were liable to pay damages to the plaintiff. There was a question of limitation raised at the trial which has assumed importance also in appeal. The main defences were that the prospectus did not contain any untrue representation but that the statements contained in it depicted a fair account of the situation, that in any event the plaintiff was not deceived by the alleged misrepresentation as is evident from his subsequent conduct when he started negotiating for purchasing more shares even after he became aware of the full facts of the case, and lastly that the claim was barred by limitation because the suit was filed more than two years after the cause of action arose. These defences indicate the points for determination in appeal also, the main contentions of the appellant's learned advocate being based upon these three points.

The learned Principal Judge of the City Civil Court who tried the suit was satisfied that the representations complained of were false, that the plaintiff was induced to become a shareholder in the company as a consequence of those representations and that the suit was not barred by limitation. A decree has accordingly been passed in favour of the plaintiff. The plaintiff's complaint is that he was deceived by an untrue representation contained in the prospectus which was printed in bolder type than the rest of the document to catch the eye of the reader. It is worded as follows :

"The Government of Cochin in order to encourage the establishment of industries for which there are natural advantages in the state have agreed to encourage this company by giving a steady and continuous supply of timbers extracted from the state forests required for the purpose of the company at economical prices. This additional facility will enable the company to compete with others successfully"

It was argued at the trial on behalf of the plaintiff that the expression "economical prices" appearing in this document was a misleading statement because the Cochin Government had only undertaken to supply timber at "reasonable" prices. This contention seems to have found favour with the learned trial Judge. But it seems to me that there is no substance in this contention. "Economical" according to the Concise Oxford Dictionary means "saving, thrifty, not wasteful." There is no warrant for the assumption that it has any technical significance when used in a commercial document like a prospectus. If the arrangement was that reasonable prices would be charged by the Cochin Government for timber supplied to the company, it cannot be said that the description in the prospectus that economical prices would be charged is in any way misleading or false, much less that it is fraudulent.

Another contention urged on behalf of the plaintiff at the trial was that the first part of the statement, viz., that the Cochin Government would encourage the company by giving a steady and continued supply of timbers extracted from the state forests required for the purposes of the company was not warranted. The promoters of the company were carrying on correspondence with the Forest Department of the Cochin Government and asking for special privileges. The ultimate reply received by the Managing Agents of the first defendant company from the Conservator of Forests, Cochin, contains the following paragraph which is the only justification for the averment in the prospectus:

"I have also to inform you that if the first year's undertaking is found to be mutually satisfactory, every consideration will be shown to your company in the matter of giving a steady supply of timber at reasonable rates."

It is clear from this part of the letter that there was only a conditional promise held out by the Cochin Government to give a steady supply of timber at reasonable rates, the condition being that the first year's transaction should be found to be mutually satisfactory. What was asserted in the prospectus was that there was an unconditional promise made by the Cochin Government to encourage the company by giving a steady and continuous supply of timbers extracted from the state forests which are required for the purpose of the company.

According to section 100 of the Indian Companies Act,

"Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus . . . shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein"

To escape liability, it is incumbent upon the directors to establish that the statement complained of was a correct and fair representation of what actually transpired. The question is, can such a justification be pleaded successfully by the directors in the present case? There cannot be any doubt that the statement complained of is misleading and untrue. It can hardly be described as a fair representation of what had transpired. If the directors have taken the respon-

sibility of asserting that there was an unconditional promise given by the Cochin Government to supply timber steadily for the purposes of the company, when as a matter of fact there was no unconditional undertaking, they must bear the consequences. I am therefore satisfied that the finding recorded by the trial Court on the first issue that the statement referred to which is contained in the prospectus is false and that it did not amount to a true and fair representation of what was stated by the Government of Cochin is correct.

An attempt was made on behalf of the appellant to show that the plaintiff was not influenced by this representation when he became a shareholder in the company. For establishing this, reliance was sought to be placed upon the subsequent conduct of the plaintiff, after the shares had been allotted to him. At that stage, the plaintiff started negotiations for getting a monopoly of the preference shares of the company. Prior to such negotiations, the plaintiff had seen the correspondence between the promoters of the company and the Cochin Government and therefore it is argued that he must then have been disillusioned about the representations contained in the prospectus. In spite of this, he persisted in endeavouring to obtain a large proportion of the preference shares of the company. There is no doubt that prior to the application sent by the plaintiff for the 250 shares, he had no knowledge of the nature of the correspondence that took place between the promoters of the company and the Cochin Government. He had only seen the prospectus published in the newspaper on which he placed reliance. He swears that he was mainly attracted by the paragraph complained of which, as already stated, was printed in bolder type than the rest of the prospectus. In such circumstances, the fact that subsequent to sending his application for shares, the plaintiff came to know of the true scope of the attitude of the Cochin Government towards the newly promoted company cannot have any significance. It is possible that he tried to get a monopoly in the shares of the company with the object of nullifying by personal effort the evil effects which he foresaw when he came to know that there was no unconditional promise held out by the Cochin Government to supply the company with timber. In my judgment, therefore, the view taken by the learned trial Judge that the plaintiff in this case, was really induced to purchase the shares by reason of the false statement contained in the prospectus is also correct.

The last question for determination is that of limitation. The plaintiff subscribed for the shares on the 13th September, 1936. The suit was filed on the 8th September, 1939—within three years, but after the expiry of two years, from the date when the cause of action arose. The question discussed at the trial was whether Article 36 of the Indian Limitation Act which may be described as the residuary Article for torts or civil wrongs, applies to this case as contended on behalf of the defendants or whether Article 120 the general residuary Article in the Indian Limitation Act which prescribes a period of six years applies to the case. If the former Article applies there is no doubt the suit is barred by limitation, because the period fixed by it is two years. The view taken by the learned Judge is that it is Article 120 that applies to the case. The appellant's learned advocate challenges the correctness of this view.

• Article 36 is worded as follows :— • • • • •

“For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for—two years—when the malfeasance, misfeasance or non-feasance takes place.”

The Articles immediately preceding this refer to specific kinds of torts or civil wrongs and prescribe the period of limitation in such cases. Therefore Article 36 is undoubtedly the residuary article in the case of torts or civil wrongs. *Prima facie* the view taken by the trial Court that Article 120 which is the general residuary Article applicable to cases which are not provided for elsewhere in the schedule to the Limitation Act, applies seems to me to be obviously incorrect. The only other alternative may be Article 115 which is the residuary Article in the case of suits for compensation for breach of contract which are not specially provided for elsewhere in the statute. The contention urged on behalf of the respondents by their learned counsel is that in any event Article 115 applies in which case the suit which was filed before the expiry of three years from the date of the cause of action must be held to be in time.

The learned trial Judge has correctly appreciated the position when he states in his judgment that the cause of action in the present case is based upon a tort or civil wrong committed by the defendants. Section 100 of the Indian Companies Act recognises an exception in the case of such a civil wrong inasmuch as a right is granted to joint tort-feasors to claim contribution. But that provision only emphasises the fact that the cause of action is not based upon contract, the wording of the section being that contribution may be claimed “as in cases of contract.” The last few words make it abundantly clear by implication that the situation is entirely unconnected with contract. The section, as already stated, recognises an exception to the general rule that there is no contribution among joint tort-feasors. The English case reported in *Geipel v. Peach*¹ from the judgment in which the learned trial Judge has quoted extensively, also makes it clear that the wrong complained of in a case of this description is a tort and not a breach of contract. Cases arising under section 235 of the Indian Companies Act cannot have any bearing on the question involved in the present case. Those are cases in which a liquidator seeks to make the directors of a company accountable for moneys misapplied or retained by them. In such cases, it has been pointed out, that the tort is not independent of contract, because there is a contractual relationship between the directors and the company, there being a liability on the part of the directors to safeguard the interests of the company, and not misapply the funds of the company. As the learned trial Judge has pointed out in his judgment, there are no authorities directly in point applicable to a case like the present. The reasoning adopted by the trial Court is that Article 36 can only apply to torts or civil wrongs like libel and slander or

trespass to immovable property, which are entirely unconnected with contracts. But the question is whether in the present case the cause of action can be said to be connected with a contract or whether it is independent of contract. The untrue or misleading statement made by the directors was contained in the prospectus published by them. At that stage, there was no contract between the plaintiff and anybody else. The directors who had floated the company were making representations with the object of inviting members of the public to apply for shares in the company. The plaintiff was misled by the misrepresentation contained in the prospectus, as a result of which he applied for shares which were accordingly allotted to him. The contract when the shares were allotted was between the plaintiff and the first defendant company and not with the directors of the company. The wrong complained of by the plaintiff happened before the formation of this contract. In such circumstances, it seems to me that the malfeasance or misfeasance complained of is entirely independent of contract. The facts do not permit of any case based upon contract being set up by the plaintiff in respect of the untrue representation contained in the prospectus. There may sometimes be cases where the same wrong is both a breach of contract and a tort. For example, as explained in Salmond's Law of Torts, 8th edition, at page 10 :

"A physician who harms his patient by negligently administering a deleterious drug is guilty of a wrong, which is both a breach of contract and a tort. It is a breach of contract because the physician has impliedly promised to use due care and skill in the treatment of his patient, and it is also a tort because, apart from contract altogether, no one has a right to do another physical harm by giving him poison. Similarly a bailee who wrongfully refuses to restore the property lent to him is liable both in contract and in tort, in contract because of his promise to restore it in due time, and in tort because no one has a right to detain another's property without some special justification. So also in all other cases in which, by a wilful or negligent act of misfeasance, harm is done to the person or property of another in the course of performing a contract made with him which involves the use of care and skill ; for example, injury done to a borrowed horse by overdriving it." It seems to me that these are typical cases in which the malfeasance, misfeasance or non-feasance involved is not independent of contract within the meaning of the Article 36. But in the present case, the wrong complained of is entirely unconnected with the contract. The damage alleged is not connected in any way with any breach of contract committed by the defendants. Before the plaintiff's contract with the first defendant company came into existence, the other defendants had committed the malfeasance or misfeasance complained of. The suit is thus not based on a cause of action arising out of contract but upon a malfeasance or misfeasance independent of contract.

The learned advocates appearing in the case have cited a number of authorities which have no direct bearing on the point for decision and for that reason it is not necessary to refer to all of them. The cases discussed below are however relevant.

The appellant's learned advocate relies on the following observations made by Sadasiva Ayyar, J in his judgment in *Pandiri Veeramma v. Mandavali Subbarao*¹ :

"As said in Rustomji's edition of Limitation Act, Article 36 is a general Article for suits for compensation for all possible acts and omissions commonly known as torts, that is wrongs independent of contracts and which are not provided for by other Articles."

The learned Judge quotes the decision in *Esso Bhayaji v. The S.S. Samtri*², in support of this observation. That was a case of a collision at sea as the result of which a ship was lost and damages were therefore claimed for the loss. In referring to Article 36, the judgment states :

"The words 'malfeasance, misfeasance and non-feasance independent of contract' used in Article 36 are of the widest import, and embrace all possible acts or omissions commonly known as torts by English lawyers ; that is to say wrongs independent of contracts I rather come to the conclusion that it was intended that two years should be the outside time allowed for bringing a suit founded upon tort, except in certain well-defined particular instances. No other conclusion can be come to when the provisions of Article 36 are compared with those in Article 115. Such a conclusion is in accordance with the provisions of other systems of law and with the dictates of common sense. There are no cases in which it is more desirable that the evidence by which they are supported or rejected should be promptly given and scrutinised than in actions of tort." These observations support the appellant's advocate's contention.

Mr. Arunachalam on behalf of the respondents places reliance on the decision reported in *Vairavan v. Avicha*³. The headnote which is extracted below indicates that there are entirely different sets of facts which gave rise to a legal position unlike that in the present case came up for consideration.

"A suit against a person for breach of contract to sell to the plaintiff certain goods of another on the implied representation that he had authority from his principal to sell them, when in fact he had none, is not one arising in tort or one independent of contract, but one arising out of and incident to a contract and is governed by Article 115 of the Limitation Act (XV of 1887) and not by Article 36 or 120."

The learned Judges, in discussing the nature of the wrong, state as follows in the judgment :

"Assuming that the action may be held to be one in tort, it is certainly not for a wrong independent of contract, but one connected with a contract and arising from one of the incidents of a contract. A person entering into a contract on behalf of a principal ought not to do so without authority from the principal. His acting on behalf of the alleged principal amounts to a representation and he has authority from the latter to do so."

¹ (1915) 31 M.L.J. 257.

² (1886) I.L.R. 11 Bom. 133.

³ (1913) 25 M.L.J. 256 : I.L.R. 38 Mad. 275.

His acting without such authority is a wrong connected with the contract. The case cannot therefore fall within the purview of Article 36.

In my judgment, therefore, Article 36 applies to the present case, the malfeasance or misfeasance which forms the basis of the plaintiff's case being one independent of contract. Since the suit was brought more than two years after the date of the cause of action, it was barred by limitation. The appeal must therefore be allowed and the suit dismissed. The next question is about costs. There is no doubt that the social and financial standing of the appellant and his co-directors was made use of by the managing director to give an artificial value to the new venture conceived by him. They have permitted their names to be used for influencing a section of the credulous public to sink capital in a company which has collapsed soon after it was started. In the circumstances, the proper order to make will be to direct the parties to bear their own costs in the Court below and to grant the appellant the costs of this appeal to be paid by the plaintiff-respondent.]

M. Shama Doss for Arunachalam, Jagannadha Doss & Co. for Appellant.

N. A. Krishna Aiyar and S. R. Subramania Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether Article 36 of the Limitation Act applies in the case of an action against the directors of a company for compensation for loss suffered as the result of a misleading prospectus.

On the 13th September, 1936, a prospectus was published in a local newspaper calling for subscriptions in respect of an issue of shares by a company called the Cochin Furniture Co., Ltd. Believing the statements in the prospectus the appellant applied for 250 shares, which were promptly allotted to him. The capital required was not obtained and the company was compelled to go into liquidation. On the 8th September, 1939, the appellant filed a suit in the City Civil Court, Madras, for rescission of the contract and for compensation for the loss which had resulted to him from the misrepresentations contained in the prospectus. The company and all the directors were made parties. The trial Court held that the prospectus did contain false statements and that the appellant was entitled to compensation in the sum of Rs. 450. The appellant did not proceed with his plea for rescission of the contract. He limited his case to the claim for compensation. One of the directors entered into a compromise with the appellant but the others contested the suit.

It was contended by the contesting defendants that the claim had been preferred out of time as the Article which governed the claim against them was Article 36. The appellant persuaded the Principal Judge of the City Civil Court who tried the suit, that the appropriate Article was Article 120. Accordingly, the suit was held to be in time. On appeal to this Court, Kunhi Raman, J., agreed with the trial Court that the appellant had a cause of action against the directors and that the finding of the trial Court that the appellant had suffered loss to the extent of Rs. 450 was correct. He disagreed, however, on the question of limitation. In his opinion the case was governed by Article 36 which meant that the suit was out of time. Consequently he set aside the decree of the City Civil Court and directed that the appellant's suit be dismissed. This appeal is from the judgment of Kunhi Raman, J.

Article 36 fixes the period of limitation at two years for suits "for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for." There is no Article in the Limitation Act which specially provides for actions against a promoter or director of a company in respect of a false statement made in a prospectus. A person who is responsible for the issue of a false prospectus commits a tort and by reason of the provisions of section 100 of the Indian Companies Act is under a statutory liability to provide compensation. Article 36 must apply to this case unless the tort complained of arises out of the contract for the issue of shares. In our opinion it does not, but is independent of the contract. The contract is between the subscriber for shares and the company. The liability of the directors is confined to something which preceded the contract, to which they are not parties.

We agree with Kunhi Raman, J., that Article 36 applies and consequently we dismiss the appeal with costs.

B.V.V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Anagha Venkata Lakshmi Narasimha Rao

∴ *Appellant**

v.

The Province of Madras represented by the Collector of Guntur and another

∴ *Respondents.*

Government of India Act (1935), section 107 and Schedule VII, List III, Entry 5—Legislation with respect to matter in concurrent legislative field—Madras Restoration of Village Officers (Validation) Act (1939), section 3—Not repugnant to last para. of section 4, Evidence Act.

The provisions of section 3 of the Madras Restoration of Village Officers (Validation) Act, that if the Provincial Government declares that an order passed by it is of the nature referred to in section 2 of that Act, the declaration shall be conclusive proof of the fact and all Courts shall take judicial notice of it, are not in conflict with the last paragraph of section 4 of the Evidence Act. There is no connection between the two. The provincial legislature has not exceeded its powers in enacting section 3 of the Act.

Appeal against the decree of the Court of the Subordinate Judge, Guntur, in A. S. No. 16 of 1942, preferred against the decree of the Court of the District Munsiff, Narasaraopet, in O. S. No. 281 of 1940.

V. Govindarajachari for Appellant.

The Government Pleader (K. Kuttikrishna Menon) and A. Lakshmayya for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal raises the question whether the Madras Legislature was acting within its powers when it enacted section 3 of the Madras Restoration of Village Officers (Validation) Act (XVIII of 1939). The Act was passed to restore to village officers or their heirs offices which they had lost by reason of their association or connection with political movements. Section 2 of the Act empowers the Provincial Government to pass orders for restoration in such circumstances. Section 3 states that if the Provincial Government declares that an order passed by it is of the nature referred to in section 2, the declaration shall be conclusive proof of the fact and all Courts shall take judicial notice of it. It is said that in making this second provision the Legislature exceeded its powers.

The appeal arises out of a suit filed by the appellant in the Court of the District Munsiff of Narasaraopet for a declaration that his removal from the office of karnam of Thalarlapalli village was unlawful and for a mandatory injunction directing his re-instatement. In 1921, the office was held by one Krishnayya, but he was removed because he had not within the time allowed to him, passed the prescribed tests. He had three sons (Hanumayya, Suryanarayana and Lakshminarasimha Row (the second defendant). None of his sons was qualified for the office and the Collector appointed Sriramulu, the father of the plaintiff. It transpired during the course of the trial that the second defendant was a supporter of the Congress party and was suspected of having taken part in the Civil Disobedience Movement of 1921. This was not the reason given by the Collector for passing over him. The reason given was that he was not qualified for the post. Sriramulu was the nearest agnatic relative of the Krishnayya family. He was appointed on the 23rd September, 1921, and held the office until the 26th April, 1933, on which date the Collector selected the plaintiff to succeed his father. By an order dated the 11th October, 1939, the Government of Madras removed the plaintiff from the post and appointed the second defendant in his stead. The Congress party was then in power and it is common ground that the order appointing the second defendant was passed because it was considered he had lost the appointment in 1921 on account of his political opinions.

The plaintiff felt himself aggrieved by this action and filed the present suit. The District Munsiff dismissed it on the ground that it was not maintainable in

* S. A. No. 1079 of 1943.

6th September, 1944.

a Civil Court by reason of the provisions of sections 2 and 3 of the Madras Restoration of Village Officers (Validation) Act of 1939. This decision was concurred in on appeal by the Subordinate Judge of Guntur. The plaintiff has now appealed to this Court.

Here it has been contended that section 3 of the Act is in conflict with the Indian Evidence Act and therefore the Legislature had no power to place it in the Act. If the Legislature had the power there can be no doubt that the suit was rightly dismissed. The order appointing the second defendant was professedly passed under section 2. A declaration was made by the Provincial Government under section 3 and the declaration was published in the Fort St. George Gazette on the 22nd October, 1939.

The argument in support of the contention that the Legislature acted beyond its powers is this. Section 107 of the Government of India Act states *inter alia* that if a provision of a Provincial law is repugnant to any existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of that section, the existing Indian law shall prevail and the Provincial law shall to the extent of the repugnancy be void. Entry No. 5 in the Concurrent Legislative List reads—

“Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.”

Therefore the Provincial Legislature could not pass an Act relating to evidence, if repugnant to the Indian Evidence Act, unless sub-section (2) were invoked, which was not the case. It is said that section 3 of the Madras Restoration of Village Officers (Validation) Act of 1939 is repugnant to the last paragraph of section 4 of the Indian Evidence Act, which is in these terms :

“When one fact is declared by this Act to be conclusive proof of another, the Court, shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”

We fail to see how section 3 of the Madras Restoration of Village Officers (Validation) Act can be said to be in conflict with this provision of law. It is obviously not in conflict. There is no connection between the two. It is conceded by the learned advocate for the appellant that section 3 of the Provincial Act is not repugnant to any other section of the Indian Evidence Act. Therefore the plea of *ultra vires* must be rejected.

Whether the Provincial Government was justified in displacing the plaintiff and appointing the second defendant to the office of the karnam of Thalarlapalli is another matter. If section 3 had not been inserted in the Provincial Act it might have been open to the appellant to contend that the case did not fall within the four corners of section 2. The Court cannot, however, go into that question, as the Legislature had provided that a declaration under section 3 shall be conclusive proof that the order passed is one of the nature contemplated by section 2. The Legislature had the power to insert the provision, and as it has done so, the jurisdiction of the Courts is ousted. The question whether this is wise does not call for discussion here.

The appeal must be dismissed with costs in favour of the second respondent.

V.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

P. S. Venkataramana Rao

Petitioner.*

Criminal Procedure Code (V of 1898), section 176—Statements recorded under—Copies could be granted.

There is no objection to the Magistrate granting copies of the statements recorded under section 176, Criminal Procedure Code of witnesses who are going to be examined at the preliminary enquiry.

* CrI. R. C. No. 446 of 1944.
(CrI. R. P. No. 420 of 1944).

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Saidapet in M. P. No. 120 of 1944 in P. R. C. No. 1 of 1944.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor. (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—*Muthia Swamiar, In re*¹, is distinguishable as the present is a case where the depositions were taken under the provisions of section 176 of the Criminal Procedure Code.

There seems no objection to the Magistrate granting copies of the statements recorded under section 176 of the Criminal Procedure Code of witnesses who are going to be examined at the preliminary enquiry.

The Magistrate will grant copies in accordance with this direction.

V. S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

M. A. Packiri Mahomed Rowther and others

.. *Appellants*.*

v.

Chow Ah Choong represented by K. N. K. Subramanyam Chettiar
and others

.. *Respondents.*

Defence of India Rules (1939), rules 2 and 97—Plaintiff, a foreigner, suing by power of attorney holder in British Indian Court—Overrunning of plaintiff's territory by enemy after dismissal of suit—Effect—Appeal by either plaintiff or power of attorney holder—Not competent.

Mahomedan Law—Will—Bequest of whole of the property to creditor to discharge subsisting debts—Not valid.

The plaintiff was a Chinese merchant resident in Penang in whose favour a Mahomedan debtor executed a will in April, 1939 by which he bequeathed to the plaintiff the whole of his movable and immovable properties in order to discharge his subsisting debts. In 1939, the plaintiff, through his power of attorney holder in this country brought a suit to recover the money due on a usufructuary mortgage deed forming one of the assets included in the will, but he was non-suited on the ground that the will was not true and valid. At the time of the hearing of the plaintiff's appeal in October, 1942, after Penang had become enemy occupied territory, objection was taken that the plaintiff was then an "enemy" within the meaning of rule 97 read with rule 2 of the Defence of India Rules and was debarred from suing in the Courts of this country.

Held, that (1) the appeal was not maintainable either by the plaintiff because he had since the dismissal of his suit become an "enemy subject" within the meaning of the Defence of India Rules, or by his power of attorney agent because the authority became automatically revoked consequent on the occupation of the plaintiff's country by the enemy.

(2) As the will disinherited all the testator's kindred and disposed of the whole of his movable and immovable property, it offends against the rule that a Mahomedan cannot by will dispose of more than a third of the surplus of his estate after the payment of funeral expenses and debts.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore, in A. S. No. 142 of 1942, preferred against the decree of the Court of the District Munsiff of Tanjore in O. S. No. 118 of 1939.

M. S. Venkatarama Aiyar for Appellants.

K. Srinivasan and T. S. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The only two questions which have been argued in this second appeal are whether the Mohammadan will on which the plaintiff relies is void, and whether the plaintiff is debarred from suing in the Courts of this country because he is an enemy within the meaning of rule 97 read with rule 2 of the Defence of India Rules. A further question arising out of the latter point is whether the plaintiff's power-of-attorney in favour of his agent was terminated as soon as he himself became an enemy within the meaning of the rules.

¹. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.

* S. A. No. 330 of 1943.

7th August, 1944.

The facts in so far as they are necessary are, that the plaintiff is a Chinese merchant resident in Penang, in whose favour a Muhammadan debtor executed a will in April, 1939, in which he bequeathed to the plaintiff the whole of his movable and immovable property in order to discharge the debts subsisting between them. In 1939 the plaintiff through his power-of-attorney holder in this country, brought a suit to recover the money due on a usufructuary mortgage deed forming one of the assets included in the will, but he was non-suited on the ground that the will was not true and valid. As the suit was filed before Penang became overrun by the Japanese, the question of the plaintiff being an enemy within the meaning of the Defence of India Rules did not then arise; but it was taken up at the time of hearing the appeal in October, 1942, after Penang had become enemy occupied territory.

Dealing with the first point, it is quite clear from the definitions contained in rule 2, and rule 97 of the Defence of India Rules that the plaintiff is an enemy and that he is resident in enemy occupied territory. In support of his argument that the plaintiff is debarred from suing in the Courts of this country so long as he is an enemy, the appellants' learned advocate relies on rule 98 (1) (iii) under which a person is deemed to trade with the enemy if he has "performed any obligation to, or discharged any obligation of, an enemy, whether the obligation was undertaken before or after the commencement of the Ordinance."

It is contended that the Courts will not offer any assistance to an enemy plaintiff in the matter of the payment of his debts or the realisation of his assets, and in support of this argument reliance is placed on the decision in *Sovfracht (V/O) v. Van Udens Schoepvaert En Agentuur Maatschappij (N. V. Gebr)*¹. In that case it was held that when former allied territory becomes occupied by an enemy, its local residents are disqualified from suing in the King's Courts except under royal license. The plaintiffs in that case were represented in England before the outbreak of war with Germany by solicitors and the contention was raised that although the appellants themselves had assumed the character of enemy subjects owing to their country being occupied by the Germans, the authority in favour of their English agents subsisted so as to permit of the action being continued. That contention was rejected and the following observations from Lord Porter's judgment are in point:

"Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other. At any moment the necessity may arise. The very relationship requires it even if it is desired only to terminate the mandate itself."

I accordingly accept the appellants' contention that the appeal was not maintainable, either by the plaintiff because he had since the dismissal of his suit become an enemy subject within the meaning of the Defence of India Rules, or by his power-of-attorney agent because the authority became automatically revoked consequent on the occupation of the plaintiff's country. In this view of the matter it becomes unnecessary to examine at any length the contention that the will is invalid because it disposed of more than one-third of the free surplus; and it is sufficient to state that as the will disinherits all his kindred and disposes of the whole of his movable and immovable property, it does offend against the rule that a Mohammadan cannot by will dispose of more than a third of the surplus of his estate after the payment of funeral expenses and debts. It might be open to the plaintiff to claim that to the extent of one-third of the free surplus the will must be upheld in view of the finding that it is both true and otherwise valid; but as the appeal is not maintainable for the reason already stated, it is unnecessary to explore this question. If in the future the plaintiff is enabled to prefer his appeal, the matter can be more fully examined.

In the result, this appeal is allowed and the appeal in the lower Court is ordered to be dismissed with costs in both Courts to the extent to which he has appealed; but it has to be mentioned that this second appeal was brought only in respect of two-thirds of the suit claim. As the first appeal is clearly not maintainable in view of the plaintiff's character as a subject of enemy occupied territory, I think it is necessary under Order 41, rule 33, of the Civil Procedure Code to order that the suit should remain dismissed with costs in its entirety.

As the appeal is dismissed, the memorandum of cross-objections does not arise and is ordered to be dismissed with no separate order as to costs.

Leave to appeal is granted.

K.S.

Appeal allowed.

• IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Appellate Jurisdiction). •

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

The Madras Provincial Co-operative Bank, Limited, Madras .. *Appellant**

v.

The South Indian Match Factory Limited (in liquidation). .. *Respondent.*

Companies Act (VII of 1913), section 244-A and Madras High Court Rules, rule 66—Cheque in the name of Official Liquidator as such paid to him over the counter by drawee's bank—Misappropriation by Official Liquidator—Breach of statutory duty placed on the bank—Bank not protected by section 85, Negotiable Instruments Act and liable for its negligence.

A cheque drawn in the name of "R, Official Liquidator in O. P. No. 5 of 1939, or order" was presented by the Official Liquidator for payment over the counter and the bank after calling for the order of appointment of the Official Liquidator and perusing the same paid him the amount for which the cheque was drawn. The Official Liquidator misappropriated it. In a suit by the succeeding Official Liquidator on behalf of the company against the bank for the recovery of the amount, on the ground of the bank's negligence in paying it to the former Official Liquidator personally,

Held : From the cheque itself the bank had notice that it was made out to the Official Liquidator as Official Liquidator and that the bank had realised this was clear from its calling for the order of appointment. The bank acting through its officers must be deemed to have known the law contained in section 244-A, Companies Act and rule 66 of the Rules of the Madras High Court made under the Act that the Official Liquidator ought to have a bank account and that he could collect the amount of the cheque only through his bank. Section 85 of the Negotiable Instruments Act would only protect the bank if it made the payment in good faith and without negligence. The officers of the bank did not realise, as they should have done, that the bank was doing something improper and in the circumstances there was negligence. There was a clear breach of a statutory duty placed upon the bank and hence it was liable.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Bell, dated 3rd December, 1943, and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 141 of 1943.

V. Radhakrishnayya for Appellant.

R. Narasimhachariar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—On the 16th February, 1939, an order for the compulsory winding up of the South Indian Match Factory, Limited, was passed in proceedings on the Original Side of this Court and one M. Ramachandra Rao, who was then an advocate of this Court, was appointed the official liquidator. The main assets consisted of the factory building and machinery. The Court directed the sale of these properties by private treaty and the official liquidator entered into negotiations with one Shamsuddin Rowther. In the month of January, 1940, an agreement was entered into between the official liquidator and Shamsuddin Rowther, for the sale of the properties, subject to the confirmation of the Court, for a sum of Rs. 5,750 and Rs. 200 was paid as earnest money. This payment was made by a crossed cheque in favour of the official liquidator. Under section 244-A of the Indian Companies Act, the official liquidator was required to open an account

with a bank and pay therein moneys received by him in the course of the liquidation. Rule 66 of the rules framed then by this Court under the Indian Companies Act required that all bills and other securities payable to the company or to the official liquidator, should, unless the Judge otherwise directed, as soon as they came into the hands of the official liquidator, be deposited by him in the bank for the purpose of being presented for acceptance and payment of payment only as the case might be. The official liquidator here failed to open an account with a bank. The cheque for Rs. 200 was drawn by the purchaser of the factory and plant on the Madras Provincial Co-operative Bank, Limited. It was a crossed cheque but the liquidator induced the bank to cash the cheque. The Court sanctioned the sale to Shamsuddin Rowther and on 9th May, a cheque for Rs. 5,550 was handed over to the official liquidator by the purchaser in discharge of the balance of purchase consideration. This cheque was drawn on the Madras Provincial Co-operative Bank, Limited, by the advocate, who was acting for the purchaser. It was an open cheque. The same day the official liquidator presented it to the Madras Provincial Co-operative Bank, Limited, for payment, and payment was made. The official liquidator misappropriated the proceeds, for which he was prosecuted, convicted and sentenced. This resulted in his name being struck off the roll of advocates. On the 8th February, 1943, Bell, J., passed an order removing M. Ramachandra Rao from the office of the official liquidator and appointed the Official Receiver of Madras to act in that capacity. The new official liquidator on the 12th February, 1943, instituted a suit on the Original Side of this Court against the Madras Provincial Co-operative Bank, Limited, for the recovery of Rs. 5,550. He alleged that the Bank had acted negligently in paying the cheque, and that it was also liable for conversion. The suit was tried by Bell, J., who held that the claim was well founded and passed a decree for Rs. 5,550 with interest. This appeal is from the judgment of the learned Judge.

The drawer of the cheque had an account with the bank and there was sufficient money in the account to meet the cheque. It is the duty of a bank in such circumstances to obey the order of its customer. Section 31 of the Negotiable Instruments Act says that the drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default. If the payee had been a private individual the action of the bank in paying the amount of the cheque could not have been called in question. It is said that inasmuch as the cheque was drawn in favour of an official liquidator the bank was put on inquiry and was negligent in paying over to him personally the amount for which the cheque was drawn. Before paying M. Ramachandra Rao, the Rs. 5,550, the bank called for his order of appointment which was, it is said, sufficient in itself to put it on inquiry. It is also said that its officers must be deemed to know the law and that M. Ramachandra Rao had no right to ask for payment to him personally.

The order of appointment has been exhibited. Clause 6 (f) prohibited the official liquidator without the sanction of the Court, from indorsing a bill of exchange, hundi or promissory note in the name and on behalf of the company. Clause 7 stated that, subject to the retention in his hands of such moneys as might be required for current and necessary expenses, the official liquidator should deposit all moneys collected by him into the Imperial Bank of India within seven days after the receipt thereof to the credit of the liquidation account. The cheque in question was made out to "M. Ramachandra Rao, official liquidator in Original Petition No. 5 of 1939, or order." From the cheque itself the bank had notice that it was made out to him as official liquidator and that it realised this in full is shown by the fact that it called for the order of appointment. The contention of the plaintiff that the bank acting through its officers must be deemed to know the law cannot be contradicted, and this case must proceed on the basis that the bank knew that the official liquidator ought to have a bank account and that he could collect the amount of this cheque only through his bank. Section 244-A of the Indian Companies Act

and rule 66 of the rules framed by this High Court under the Indian Companies Act make this perfectly clear.

We will now turn to section 85 of the Negotiable Instruments Act. Section 85, says that where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment "in due course." Section 10 defines what is payment "in due course" and it says it means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. Therefore section 85 only protected the bank, if it made payment in accordance with the tenor of the instrument, in good faith and without negligence. Was this payment made to M. Ramachandra Rao by the bank on the 9th May, 1940, a payment made in good faith and without negligence? We have no doubt that the officers of the bank did not realise, as they should have done, that the bank was doing something improper, but in the circumstances there was negligence. They knew or must be deemed to have known that this money could only be collected by the payee through his own bank and therefore it was most improper on his part to ask for payment over the drawee's counter. In our judgment there was here a clear breach of a statutory duty placed upon the bank and the learned Judge was right in holding the bank liable. The payment of the cash to M. Ramachandra Rao facilitated his misappropriation of the money. As payment was not made in due course section 85 does not help the bank and it must take the consequence of its negligence.

The appeal is dismissed with costs.

V.S.

Appeal dismissed

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Paru Kutty Amma

. . .

*Appellant**

v.

Vasudevan (minor) by guardian A. M. Kutti Sankaran *alias* Chinna

Kuttan Nair and others

Respondents.

Will—Construction—Bequest to grandchildren—Son placed in management during minority—One legatee attaining majority—Suit for partition and possession of share of legacy—Maintainability.

Where property is left to a person absolutely under a will and the will directs that it should not be handed over to the legatee until he has attained a certain age beyond majority, the direction must be ignored, unless the will confers an interest in the property upon some other person for the intervening period. If it does not, the legatee is entitled, on attaining majority, to be placed in possession of his legacy.

The testator left certain properties to his two younger sons and daughter, and other properties to the son and daughter of his eldest son. The will provided that the properties left to the latter should remain in the possession and management of their father during their minority and then, were to be handed over to them jointly. After the daughter of the eldest son of the testator came of age she filed a suit for partition and possession of her share, her minor brother being impleaded as defendant.

Held, that the suit was not premature and that the claim for partition and possession by the plaintiff was maintainable.

Husenbhoy v. Ahmedbhoy, (1901) I.L.R. 26 Bom. 319 and *Lloyd v. Webbe*, (1896) I.L.R. 24 Cal. 44 relied on.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in O. S. No. 36 of 1942.

K. Kuttikrishna Menon and *A. Gopalakrishnan* for Appellant.

T. K. Raman Nambisan, *P. Govinda Menon* and *T. C. Raghavan*, for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant filed a suit in the Court of the Subordinate Judge of Ottapalam for partition and possession of the properties left jointly to

* Appeal No. 153 of 1943.

her and her brother under the will of their grandfather, Ravunni Panikker, who died on the 3rd December, 1938. The Subordinate Judge dismissed the suit on the ground that her claim was premature. The appeal is against that decision.

Ravunni Panikker had three sons and a daughter. His eldest son is the second defendant, who is the father of the plaintiff and the first defendant. The testator left certain properties to his sons and daughter, and other properties to the son and daughter of the second defendant. The will provided that the properties left to the plaintiff and the first defendant should remain in the possession and management of their father during their minority and then they were to be handed over to them jointly. After the plaintiff became of age she filed this suit. Her brother was then and still is a minor. Three preliminary issues were framed, two of which were decided in favour of the plaintiff. The third issue was whether the suit was premature and that it was premature was strenuously argued on behalf of the father. The Subordinate Judge held that it was premature. He was of the opinion that section 117 of the Indian Succession Act which allows the accumulation of income provided that the period is not longer than 18 years had bearing. We fail to see what application this section has here. The plaintiff received an absolute interest in one half of the properties left by the testator to her and her brother, and on her attaining majority she was entitled to be put in possession of her share.

In *Hasenbroy v. Ahmedbhai*¹, the Bombay High Court held that where property is left to a person absolutely and the will directs that it should not be handed over to a legatee until he has attained a certain age beyond majority the direction must be ignored, unless the will confers an interest in the property upon some other person for the intervening period. If it does not, the legatee is entitled on attaining majority to be placed in possession of his legacy. This principle was laid down in *Gosling v. Gosling*². It was also applied by the Calcutta High Court in *Lloyd v. Webbe*³.

We hold that that principle governs this case and that the Subordinate Judge was wrong in declaring the plaintiff's suit to be premature. The first defendant is represented by a guardian-ad-litem appointed by the Court. The guardian-ad-litem supports the appeal. The opposition only comes from the father and it follows from what we have said that we consider that his objection is unsustainable.

The appeal is allowed and the suit remanded to the trial Court to hear and determine the other issues according to law. The appellant and the first respondent are entitled to their costs (one set each) which will be paid by the father. The costs of the trial Court will abide the further hearing.

B.V.V.*

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Pulimati Krishnamurthi

.. *Petitioner**

v.

Boggavarapu Narayana and another

.. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 13—Scope.

There is nothing in section 13 of the Madras Agriculturists' Relief Act which imports the explanation to section 8 and allows the Court to go behind the contract. In a suit on a promissory note of 1942 executed in settlement of previous debts of 1939, in giving relief under the Act, section 13 can be applied to the suit contract only but not to the previous debts which it superseded.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Bezwada, in S. C. S. No. 25 of 1943.

Kasturi Seshagiri Rao for Petitioner.

V. Subramanyam for Respondents.

1. (1901) I.L.R. 26 Bom. 319.

2. 123 R.R. 107.

* C. R. P. No. 1514 of 1943.

3. (1896) I.L.R. 24 Cal. 44.

The Court delivered the following

JUDGMENT.—The petitioner sued on a promissory note dated the 16th March, 1942, for a sum of Rs. 1,818-3-0 executed in settlement of previous debts, one of May 1939 and the other of June 1939. The suit promissory note carried compound interest. It was admitted in the lower Court that the respondent was an agriculturist entitled to relief under Madras Act IV of 1938. The lower Court in applying section 13 of that Act, has apparently laboured under the misapprehension that section 13 was to be applied not to the actual suit contract, but to the previous debts which it superseded. There is nothing in section 13 which imports the explanation to section 8 and allows the Court to go behind the contract. The defendant may, of course, raise contentions under the ordinary law such as failure of consideration or a plea that the suit debt is nothing more than an acknowledgment of the antecedent debt, which would justify the Court into going into the amount due under the antecedent debt. The defendant did in fact raise the contention that when the defendant signed the suit promissory note, he did so under a representation that the amount for which he signed was only the amount due on applying the provisions of Act IV of 1938. Unfortunately the defendant adduced no evidence; probably because under a misapprehension of the law shared by the lower Court, it was thought that evidence was unnecessary.

It is pointed out for the respondent that the suit contract is one which will come within the purview of the Madras amendment of the Usurious Loans Act, if it is established that the defendant is an agriculturist within the meaning of that Act, to which a somewhat different definition of an agriculturist applies from that embodied in Act IV of 1938. It is quite clear that the Court is not bound to go into any question of the Usurious Loans Act, unless there is a pleading and evidence in support of it. The defendant's case has been mismanaged in the Court below. I do not feel inclined to give a decree without giving the defendant a further opportunity to let in evidence, as it appears likely that the failure of the defendant to let in evidence may have been due to the legal misconceptions under which the learned trial Judge was labouring. The defendant should, however, pay the costs of this revision, which have been necessitated to a large extent by his negligence.

The revision petition is allowed with costs and the suit is remanded to the lower Court for fresh disposal after allowing both parties to adduce further evidence.

V.P.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

A. V. Viswanatha Chetti

Petitioner.*

Defence of India Rules, rule 81 (4)—Food Grains Control Order (1942)—Breach of condition in licence—Offence under rule 81 (4) of the Rules.

The conditions of a license issued under the Food Grains Control Order should be regarded as part of that order itself, so that any contravention of any one of the conditions would be a contravention of an order made under rule 81 (2) and punishable under rule 81 (4) of the Defence of India Rules.

In re *Chenchu Raghavalu Chetty*, (1943) 2 M.L.J. 378, followed and *Umesh Chandra Ghosh v. Queen-Empress*, (1899) I.L.R. 26 Cal. 571, distinguished.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Additional Sessions Judge of the Court of Session of Salem division in C. A. No. 4 of 1944 (C. C. No. 150 of 1943 on the file of the Sub-Divisional First Class Magistrate of Dharmapuri).

K. S. Jayarama Aiyar and V. R. Srinivasan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

* Cr. R. C. No. 539 of 1944.
(Cr. R. P. No. 510 of 1944).

ORDER.—The petitioner has been convicted of offences punishable under rule 81 (4) read with rule 81 (2) of the Defence of India Rules and has been sentenced to pay a fine of Rs. 60 or, in default, to undergo six weeks' rigorous imprisonment. The petitioner, as a result of an inspection of his business premises on the 8th June, 1943, was found to have failed to exhibit a notice board in front of his shop showing the prices of the food grains for sale and to have failed to maintain his stock account correctly in contravention of rules 3 and 7 of the license issued to him under the Food Grains Control Order.

Rule 81 (4) of the Defence of India Rules provides that "if any person contravenes any order made under this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both." The Food Grains Control Order was made under rule 81 (2). Mr. Jayarama Ayyar for the petitioner does not challenge the finding that the petitioner had contravened the terms of his license. He argues that no offence punishable under rule 81 (4) was committed because there has been no contravention of an order made under rule 81 but a mere breach of a condition of the license issued under the order. This argument was advanced before Kuppaswami Ayyar, J., in *In re Chenchu Raghavalu Chetti*¹ and he refused to accept it. Mr. Jayarama Ayyar, however, says that he feels justified in pressing the same argument before me because in *re Chenchu Raghavalu Chetti*¹, was dismissed *in limine* and because the attention of Mr. Justice Kuppaswami Ayyar was not drawn to a Bench decision of the Calcutta High Court in *Umesh Chander Ghosh v. Queen-Empress*².

The question in *Umesh Chander Ghosh v. Queen-Empress*², arose under the Opium Act (I of 1878). The appellant had been convicted under section 9 of the Opium Act on the footing that by failing to keep correct accounts of the sale of opium he had contravened a rule made under section 5 of the Act. Rule 15 (1) of the rules made under section 5 stated that "a person to whom a license has been granted . . . may sell opium by retail in accordance with the conditions specified in the license." The conditions were issued as subsidiary rules by the Board of Revenue and rule 13 sets out the manner in which accounts of the sale of opium were to be kept. Rule 18 provided that in case of an infringement of any of the conditions the license should be cancelled. I do not find that any general proposition is laid down in *Umesh Chander Ghosh v. Queen-Empress*², such as is contended for by Mr. Jayarama Ayyar, namely, that a breach of a condition in a license issued under an order is not punishable as if it was a breach of the order itself. The learned Judges who decided *Umesh Chander Ghosh v. Queen-Empress*² seem to have founded their decision on the fact that the subsidiary rules which constituted the license were issued separately by the Board of Revenue and not by the Government, that the penalty provided for a breach of the rules issued by the Board of Revenue was cancellation of the license, and that Government had not issued any rule under section 5 of the Act which makes the preparation of an incorrect account punishable under section 9.

In my opinion, the reasoning on which the decision in *Umesh Chander Ghosh v. Queen-Empress*², is founded will not apply to the contravention of a condition of the license issued under the Food Grains Control Order. It is true that the license is actually issued by the Provincial Government or by an officer authorised by the Provincial Government to do so; but clause 4 of the order states that licenses shall be in Form A, a Form set forth in the second schedule to the order, and clause 6 (1) enacts that "no person being the holder of a license issued or deemed to be issued under this order shall contravene any of the conditions mentioned in Form A," and, while stating that the license of any person who contravenes any of its provisions may be cancelled, specifically provides that this is without prejudice to any other action that may be taken against him. It is clear that the Government of India intended that the conditions of the license should be regarded as part of

1. (1943) 2 M.L.J. 378.

2. (1899) I.L.R. 26 Cal. 571.

the Food Grains Control Order so that a contravention of any one of the conditions would be a contravention of an order made under rule 81 (2) and punishable under rule 81 (4) and in my judgment, effect has been given to the intention by the terms of the Food Grains Control Order.

With respect, therefore, I agree with the decision of Kuppuswami Ayyar, J., in *In re Chenchu Rahgavalu Chetti*¹. The petition is dismissed.

K. S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Tiruveedhula Venkata Narayana

*Appellant**

v.

Vadlamudi Koteswara Rao and another

Respondents.

Madras Debt Conciliation Act (XI of 1936), section 14—Agreement under sub-section (1) duly registered under sub-section (2)—Executability by Civil Court having jurisdiction without prior application to the board for transfer of decree to the Court.

An agreement under section 14 (1) of the Madras Debt Conciliation Act which has been duly registered under sub-section (2) of section 14 can be executed by the Civil Court having jurisdiction without a prior application to the Debt Conciliation Board for transfer of the decree to the Court.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, dated 15th July, 1943, and made in A. S. No. 59 of 1943, preferred against the order of the Court of the District Munsiff, Repalle dated 12th February, 1943, and made in E. P. No. 280 of 1942, in case No. 42 of 1939 on the file of the Debt Conciliation Board, Tenali.

K. Kameswara Rao for Appellant.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—The point which arises in this second appeal is whether an agreement under section 14 (1) of the Madras Debt Conciliation Act which has been duly registered under sub-section (2) of section 14 can be executed by the Civil Court having jurisdiction without a prior application to the Debt Conciliation Board for transfer of the decree. The lower appellate Court has held that the petitioner's application for recognition of the assignment in his favour and for execution must first be made to the Board and that execution can be had only after the agreement under section 14 (1) has been transmitted to the proper Civil Court for execution.

Section 14 (2) of the Act is in these words :

"An agreement made under sub-section (1) shall, within thirty days from the date of the making thereof, be registered under the Indian Registration Act, 1908, by the Chairman of the Board in such manner as may be prescribed and it shall then take effect as if it were a decree of a Civil Court and be executable as such."

There are no rules framed under the Debt Conciliation Act corresponding to rules framed under the Madras Co-operative Societies Act, and as there is in the latter rules a special procedure laid down for the enforcement of a decision under section 51 of the Co-operative Societies Act, it is argued that a corresponding agreement under section 14 of the Debt Conciliation Act cannot be executed directly by the Civil Court. The relevant provisions are contained in rule 15, clauses 7 and 8 of the rules framed under the Co-operative Societies Act, and clause 7 (3) is in these words :

"On application to the Civil Court having jurisdiction over the subject-matter of the decision or award, that Court shall enforce the decision or award as if it were a final decree of the Court."

This provision is on the same lines as that contained in section 14 (2) of the Debt Conciliation Act, the only difference being that under the latter section the decision is to take effect as a decree, whereas in the former provision the award is spoken

¹. (1943) 2 M.L.J. 378.

* A. A. A. O. No. 316 of 1943.

31st August, 1944.

of as being enforceable ; the difference is negligible because whether a decree takes effect or is enforceable, either result can be achieved only by the process of execution. What is important to notice is that section 51 of the Co-operative Societies Act does not contain any provision corresponding to that embodied in section 14 (2) of the Debt Conciliation Act, and it was therefore left to the rules framed under the former Act to confer the necessary jurisdiction on the Registrar and the Civil Courts to enforce the decision. The jurisdiction of the Civil Court to enforce an agreement under section 14 (1) of the Debt Conciliation Act is provided for in the section itself, and therefore there was no necessity for any separate rule to be framed indicating the procedure to be followed. Sub-section (2) states clearly that the agreement "shall take effect as if it were a decree of a Civil Court and be executable as such." In the corresponding rules under the Madras Co-operative Societies Act an application to the Court is contemplated ; but as a decree cannot be executed without the prior presentation of an execution application, it necessarily follows that under section 14 (2) of the Debt Conciliation Act an application has to be made direct to the Civil Court having jurisdiction.

In the result, the appeal is allowed, the decision of the lower appellate Court is set aside, and that of the trial Court is restored with costs throughout.

K.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Vanimisetti Satyanarayana

*Petitioner**

v.

Tummalapalli Vara Narayanamurthy and others

Respondents.

Trusts Act (II of 1882), sections 73 and 74—Application for removal of one of the trustees and appointment of another in his stead on the ground of breach of trust—Maintainability.

Section 73 of the Trusts Act is not intended to deal with questions which require an elaborate enquiry, but with matters that could suitably be disposed of in a summary inquiry. Section 74 only applies to cases where section 73 is inapplicable. Where breaches of trust are alleged against a trustee, his removal and the appointment of another in his stead could be asked for by an application and the matter could be decided under sections 73 and 74 of the Trusts Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, West Godavari, dated 11th August, 1943 and made in O. P. No. 65 of 1942.

D. Narasaraju for Petitioner.

V. Viyanna for Respondents.

The Court delivered the following.

JUDGMENT.—Some members of a family, three of whom had been adjudged insolvents, executed a trust deed conveying their property in trust for the purpose of discharging their debts. The petitioner here is one of the trustees appointed. One of the executants of the trust deed, the petitioner in the lower Court, filed an application praying for the removal of the second respondent, who is continuing in management of the trust properties, and for the appointment of another in his stead, on the ground that he had committed breaches of trust. A preliminary objection was raised that section 74 of the Indian Trusts Act was not applicable. The learned District Judge disposed of that objection very summarily by saying, "The second respondent contends that the petition is not maintainable under section 74. I disagree with him. The matter is governed by direct authority, vide *Assanmal v. Sonimal*¹. The matter will be posted for enquiry."

The matter has been considered in a few cases, one relied on by the learned advocate for the petitioner being *Nathabhai Devidas v. Waghjibhai Javerbhai*². The argument advanced is that sections 73 and 74 contemplate only cases where certain

* C. R. P. No. 1092 of 1943.

1. A.I.R., 1930 Sind 41.

11th August, 1944.

2. (1927) I.L.R. 52 Bom. 32.

facts are admitted or are beyond dispute, and that if it is necessary to consider a complicated question such as whether a trustee has committed a breach of trust, then the proper remedy is by way of a suit. The learned Judges in *Nathabhai Devidas v. Waghjiibhai Javerbhai*¹, disposed of the matter very briefly. The learned Chief Justice, who delivered the judgment, said :

"Speaking generally, applications for the removal of a trustee should undoubtedly be brought by a suit. And where, as here, it is alleged that the trustees have committed a breach of trust, that suit should ask for the delinquent trustees to make good the breach of trust. Further, the suit should normally ask for the administration of the trust estate by the Court. Nothing of that sort has been done here."

The learned Judges then referred to a citation from Lewin on Trusts, 9th edition, page 1166 :

"If there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by suit."

The matter has been considered much more fully in various cases by the Sind Court. *Assanmal v. Sonimal*², was concerned with the question whether the word "unfit" may be interpreted to mean physically incapable or whether it could also be applied to persons who had committed breaches of trust. The learned Judge, after discussing this question, went on to say that there was no reason to think that section 73 intended that the party should have recourse to a suit before it could be declared that a person was unfit to continue as a trustee. The matter came up for much fuller consideration before a Bench of the same Court in *Tirath Das v. Parameshwaribai*³, where the learned Judges pointed out that even in English Courts such questions were decided in summary inquiries. They held that, as in England under the corresponding provision, section 73 was not intended to deal with questions which require an elaborate enquiry, but with matters that could suitably be disposed of in a summary inquiry. They then went on to consider the merits of the allegations, and came to the conclusion that it was clear from the documents on record in a previous suit that the trustee in question was not fit to continue. They thereupon proceeded to apply sections 73 and 74. I respectfully agree with the reasoning in that carefully considered judgment.

Section 74 only applies to cases where section 73 is inapplicable. Section 73 provides for the appointment of a new trustee in the place of a trustee who has been found to be suffering from any disqualification mentioned in section 73. There are several other trustees ; and in the event of the petitioner's being removed the remaining trustees would have to appoint another trustee in his place.

The petition is dismissed with the observation that the inquiry is limited in its scope to matters that can be readily determined in an inquiry of a summary nature.

The costs of this petition will be costs in the application.

V.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE BELL.

M. M. P. L. Chokkalingam Chettiar

*Appellant**

v.

M. L. R. M. Lakshmanan Chettiar and another

Respondents.

Civil Procedure Code (V of 1908), Order 21, rules 2 and 95—Scope and applicability of rule 2—Agreement subsequent to confirmation of sale if can be pleaded in bar of delivery under rule 95.

Order 21, rule 2, Civil Procedure Code is concerned only with satisfaction and adjustment of a decree and the manner in which it should be brought to the notice of the Court, and the consequences of failure to do so. It cannot possibly apply to a situation in which the decree-holder has realised his money by selling the judgment-debtor's property in execution and receiving the sale proceeds, either in cash if some one else has purchased the property or by set off if he has purchased

1. (1927) I.L.R. 52 Bom. 32.

2. A.I.R. 1930 Sind 41.

3. I.L.R. (1943) Karachi 213 ; A.I.R. 1943 Sind 223.

* A. A. O. No. 127 of 1944.

it himself. There is a clear distinction to be drawn between proceedings *for* execution of the decree and the proceedings *in* execution.

The decree-holder purchased the property of the judgment-debtor in execution of his decree and applied for its delivery under rule 95 of Order 21. The judgment-debtor resisted delivery and pleaded that under an agreement between him, the decree-holder and a third person, he was to be left in possession of the property sold. The Subordinate Judge held that such a plea could not be recognised under Order 21, rule 2 (3) and refused to consider it. On appeal,

Held, that the Subordinate Judge was wrong in refusing to consider the plea raised on its merits. Execution in the strict sense of the term is over before an application for delivery of possession can be made.

Appeal against the order of the Court of the Subordinate Judge, Mayavaram, dated 11th February, 1944, in E. A. No. 212 of 1943 (in O. S. No. 115 of 1929 on the file of the Court of the Subordinate Judge, Devakottah).

K. Rajah Aiyar and R. Rangachari for Appellant.

R. Gopalaswami Aiyangar and K. Sundarajan for Respondents.

The Judgment of the Court was delivered by

King, J.—The question involved in the determination of this appeal is the interpretation of Order 21, rule 2 of the Civil Procedure Code. The facts of the case are that the first respondent obtained a decree in O. S. No. 115 of 1929 on the file of the Subordinate Judge of Devakottah. That decree provided for the payment to him of a sum of Rs. 25,000 and gave him a charge upon the Peralam Rice Mills. The first respondent proceeded to execute the decree and on the 12th of April, 1940, brought these mills to sale. They were purchased at the court-auction by the decree-holder himself for Rs. 38,225 and it is common ground that this amount completely or almost completely satisfies the claim of the first respondent for the money due to him under the decree. This sale was confirmed on 16th October, 1940, and the confirmation of the sale was subsequently upheld on appeal by the High Court. After the disposal of the appeal the first respondent filed an application under Order 21, rule 95, for delivery of the property which he had purchased. The appellant, who was the judgment debtor under the decree, resisted the application of the decree-holder, and pleaded that he and the decree-holder and a third person had all entered into an agreement on 9th January, 1941, one term of which was that the appellant was to be allowed to remain in possession of the mills. The learned Subordinate Judge of Mayavaram held that this plea could not be recognised under the provisions of Order 21, rule 2, clause 3 as it had not been certified or recorded under any earlier clause of that rule. The question is, whether this view of the learned Subordinate Judge is right or wrong?

There is no direct authority on this question, and we are not surprised at the absence of any such direct authority, for the pleading of a mutual agreement of any kind by a judgment-debtor at a time subsequent to the sale of his property and the confirmation of that sale must, in the nature of things, be a very rare occurrence. At the same time it seems to us the task of interpreting Order 21, rule 2, involves no great difficulty. What are the conditions under which alone the provisions of Order 21, rule 2 become operative? They are clearly these—that a decree-holder has a decree in his favour directing the payment of money to him, and that from the Court's point of view that decree has not yet been executed. Rule 2 amplifies the permission given to the decree-holder by rule 1 to receive his money or its equivalent out of Court, and if he has done so, lays upon him the duty of reporting the satisfaction or adjustment in whole or in part to the Court. Rule 2 provides also that the judgment-debtor or certain other persons interested may make a similar report. If the decreeholder reports this the Court must record satisfaction. If anyone else reports it the Court must record satisfaction, if it finds that cause has not been shown against it. Finally in clause 3 the rule provides that a payment or adjustment not so certified or recorded "shall not be recognised by any Court executing the decree." What now is the inevitable result of action being taken under clause 3? It is this, that the decree has not been satisfied or adjusted, and therefore that the decree-holder can still proceed to recover his money by process of execution. An examination of the rule as a whole will thus show.

that it cannot possibly apply to a situation in which the decree-holder has realised his money by selling his judgment-debtor's property in execution and receiving the sale proceeds, either in cash if some one else has purchased the property or by set off if he has purchased it himself.

We have already stated that there is no direct authority on this question ; but learned counsel on both sides have called our attention to various decisions of the Madras High Court which bear indirectly upon the question, and we now proceed to consider these.

The first set of these decisions deals primarily with the question of limitation. It has been held in *Sultan Sahib Marakayar v. Chidambaram Chettiar*¹ and this has been confirmed by a Full Bench decision in *Abdul Azim Sahib v. Chokkan Chettiar*² that an application by a decree-holder who has purchased the property of his judgment-debtor in execution for delivery of that property to him is not an application for execution falling within Article 182 of the Limitation Act. Before Article 180 was enacted and no specific provision was made in the Limitation Act for applications of this kind, it was held that the residuary Article corresponding to the present Article 181 would apply to such applications. Now that Article 180 has been included in the schedule of the Limitation Act it is clear according to the Full Bench decision that Article 180 applies. These rulings have been cited before us by the learned counsel for the appellant. It seems to us that if any help were required they do materially help in the interpretation of Order 21, rule 2. These decisions depend upon an analysis of the precise nature of the application made by the decree-holder in these particular circumstances. It is stated in the former of these decisions on page 138 :

"It is clear that an application by a decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree, a direction for delivery of possession being no part of the decree"

The presumption, therefore, that may be drawn from the principle of these rulings is that execution in the strict sense of the term is over before such an application can be made ; and indeed it is clear that this is the correct view if we consider the alternative case of the purchase of the judgment-debtor's property not by the decree-holder but by some stranger purchaser.

As against this the learned counsel for the respondent has referred us to a line of cases culminating in the Full Bench decision in *Sankara Menon v. Sundara Aiyar*³, which lay down that an application of a decree-holder purchaser for delivery of the property purchased by him in execution is a step in aid of execution within the meaning of that expression in Article 182 of the Limitation Act. It seems to us that this is quite irrelevant for the purpose of our present decision. It deals only with a situation in which a subsequent application for execution has been put in by the decree-holder and the question is, whether that application is in time or not ? If the application with which we have to deal is simply an application for delivery, and has not been followed by any fresh application in execution, obviously, under the authority of *Abdul Azim Sahib v. Chokkan Chettiar*² Article 180 must be applied. The interpretation of a certain application as a step in aid must necessarily be confined to certain circumstances, as is clear from the headnote to the latest Full Bench decision which runs as follows :

"An application by a decree-holder for delivery of possession of the immovable property purchased by him in a sale held in execution of a decree is a step in aid of the execution of the decree within the meaning of Article 182 (5) of the Indian Limitation Act, for the purpose of computing limitation in respect of a fresh application by him for execution of that decree against the judgment-debtor, for the balance of the decree amount."

Our attention has next been drawn to another Full Bench ruling of this High Court reported in *Alagasundaram Pillai v. Pichuvier*⁴. The question there at issue was whether proceedings under rule 97 or rule 100 of Order 21 of the Civil Procedure

1. (1908) 19 M.L.J. 224; I.L.R. 32 Mad. 136.

322 (F.B.).

2. (1935) 69 M.L.J. 821; I.L.R. 58 Mad. 893.

4. (1929) 57 M.L.J. 381; I.L.R. 52 Mad.

3. (1943) 1 M.L.J. 9; I.L.R. (1943) Mad.

899 (F.B.).

Code are proceedings to which Order 9 of the Code applied. It was held that Order 9 does not apply to those proceedings. The reason was that Order 9 does not apply to proceedings in execution, unless of course those proceedings are proceedings which fall within the terms of section 47. In order to reach this decision the learned Judges were constrained to hold that applications under rules 97 and 100 were applications in execution, the main reason for that decision being that they were applications provided for by the Civil Procedure Code in Order 21, which deals with the whole subject of execution of decrees and orders. It does not seem to us that this ruling either, directly touches the main question now at issue. There is, in our opinion, a clear distinction to be drawn between proceedings *for* execution of the decree and the proceedings *in* execution. In fact, the learned Judges themselves, in this ruling, point this out very clearly, and they say that proceedings under rules 97 and 100 follow as a "*sequelae* on the execution of the decree (using the word "execution" in its stricter sense) and on the court-sale, and the legislature has enacted that such proceedings shall be regarded in law as part of the execution proceedings." This decision, therefore, in no way shakes the principle upon which it has been decided in *Abdul Azim Sahib v. Chokkan Chettiar*¹, that Article 180 of the Limitation Act applies to an application of this kind on the ground that it is not an application for execution.

Finally it has been argued for the respondent that an application of this kind for delivery of property purchased by the decree-holder in execution of his decree falls within section 47 and therefore we ought to hold that it falls within rule 2 of Order 21 as well. It will be obvious however that the language of section 47 is very different from the language of rule 2. Section 47 directs that all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. It is easy to see that applications which are filed after the execution of the decree in the strict sense of the word has been completed relate to such execution and therefore fall under section 47. But, as we pointed out at the outset of this judgment, Order 21, rule 2 is concerned only with satisfaction and adjustment of a decree, and the manner in which such satisfaction or adjustment should be brought to the notice of the Court, and the inevitable result of the non-existence of any satisfaction or adjustment out of Court or the non-certification of such satisfaction or adjustment is that the decree remains unexecuted and the decree-holder still has a valid claim for his money. We return, therefore, to the interpretation of rule 2 with which we started, and we hold that the learned Subordinate Judge was wrong in refusing to consider the plea of the appellant in this case on its merits.

The learned Judge has formulated three points for determination in paragraph 6 of his judgment. He has determined only the first two points and we have had to disagree with him on these points. This appeal will accordingly be allowed. The application will be restored to file and the learned Subordinate Judge will be directed to dispose of it according to law after considering and giving his finding upon the third point for determination. The appellant's costs of this appeal will be paid by the first respondent.

V.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Mathayyan

*Petitioner.**

Criminal Procedure Code (V of 1898), section 164—Statement under—Copy of statement not furnished to cross-examining counsel—Duty of Court to grant such a statement.

Where a case has been taken on file and is being tried there ought to be no objection to the granting of a copy of a statement recorded under section 164 of Criminal Procedure Code, as it would be necessary for the cross-examination of the witness. As a matter of fact it would be more con-

1. (1935) 69 M.L.J. 821; I.L.R. 58 Mad. 893.

* Cr. R. C. No. 33 of 1944.
(Cr. R. P. No. 31 of 1944).

26th January, 1944.

venient to the Court itself to grant such copies in advance, as it may avoid the necessity for an adjournment on the ground that the cross-examining counsel is not posted with facts stated in the statement recorded under section 164, Criminal Procedure Code.

Emperor v. Muthiah Swamiyar, (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466, distinguished.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate, Coonoor, dated 8th January, 1944 and passed in P. R. C. No. 7 of 1943, declining to grant a copy to the accused of the statement of P. W. 6, recorded under section 164, Criminal Procedure Code.

C. D. Venkataramanan for *K. V. Ramaseshan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

• ORDER.—Since the case has been taken on file and is being tried, there ought to be no objection to the granting of a copy of a statement recorded under section 164 of the Criminal Procedure Code, as it would be necessary for the cross-examination of the witness. As a matter of fact, it will be more convenient to the Court itself to grant such copies in advance as it may avoid the necessity for an adjournment on the ground that the cross-examining counsel is not posted with the facts stated in the statement recorded under section 164, Criminal Procedure Code. The lower Court is therefore directed to furnish a copy to the petitioner in time to enable him to cross-examine the witness. The decision in *Emperor v. Muthiah Swamiyar*¹ has no application to the facts of this case. All that was stated there is that a person under remand is not entitled to a copy before the commencement of the preliminary enquiry. In this case the preliminary enquiry has commenced and witnesses have been examined.

K.C.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Karuppaswami Moopanar

.. Appellant*

v.

Chottabhai Janerbhai & Co., through its Agent Ambalal D. Patel. Respondent.

Contract—Settlement contract—No need for delivery or tender of delivery of goods—Payment of differences in prices alone to be made.

In cases of settlement contracts, that is, cross-contracts entered into with the very person with whom the prior contracts were entered into, with a view to settle the obligation arising under the contracts,

Held, that there is really no need for either party to tender the goods or tender the price and the Courts may allow a set off as regards delivery and as regards the payment of price for everything except the differences.

Appeal against the decree of the District Court of Madura in A. S. No. 178 of 1941, preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 89 of 1940.

V. Ramaswami Aiyar and *V. Meenakshisundaram* for Appellant.

R. Viswanathan and *N. D. Varadachariar* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff and the defendants are traders in Madura town. They entered into contracts which are really cross-contracts for purchase and repurchase of certain quantities of yarn. The contracts wherein the plaintiff was the buyer and the defendant the seller are set out in Schedule A. They range between 31st July, 1937, and 5th August, 1937. These contracts were entered into on seven days between 31st July, and the 5th August, 1937. The total quantity covered by those contracts is 90 cases of yarn, 30 cases for the October delivery, 30 for November delivery and 30 for the December delivery. In respect of those 90 cases covered by the contracts mentioned above, there were contracts between

1. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.

* S. A. No. 952 of 1943.

19th September, 1944.

the 17th August, 1937, and 6th September, 1937, by which 90 cases of yarn were agreed to be sold by the plaintiff and purchased by the defendant at prices which are slightly higher than those provided in the contracts set out in Schedule A. The plaintiff filed the suit for recovery of the difference of prices as the prices at which he agreed to sell and the defendant agreed to buy were higher than those for which he agreed to buy and the defendant agreed to sell. If both the parties had actually gone through what I shall later on point out to be a mere farce of taking delivery and paying the price, the plaintiff would have to pay a particular sum and get from the defendant a larger sum and the difference between the two is the subject-matter of the suit.

In such a case like this there is really no need to tender delivery of the goods by the one or any demand by the other for delivery of the goods on tender of the purchase price. It would be an useless and idle formality to insist upon such demands or tenders in cases of what are really settlement contracts. The plaintiff agreed to buy the 90 cases of yarn from the defendant. Apparently the market was rising. In some cases the person who agrees to sell and who finds the market rising generally enters into contracts with third parties for the purchase of the goods which he has agreed to sell under the prior contracts. Such contracts are generally known as contracts to cover the transactions which had already been entered into. In cases where these contracts are entered into with the very person with whom the prior contracts were already entered into, they are generally known as settlement contracts, i.e., this is with a view to settle the obligation arising under the contracts. Whether the legal effect is as put in *Ramgopal v. Ram Sarup*¹ that a new contract has come into existence or must be necessarily inferred that only the difference should be paid, or whether it is as Rankin, J., as he then was, put it in *Uttem Chand Saligram v. Jewa Mamooje*², that the earlier contract is still alive, but the Courts allow a set off as regards delivery and as regards the payment of price for everything except the differences, in either case it seems to me the result is the same, viz., that if such cross-contracts are entered into, there is no necessity for either party to either tender the goods or tender the price. The person who has to get the difference can without going through the farce of tender claim the difference which is really in his favour. In the present case the contract in Schedules A and B covers exactly the quantity of 90 cases. The view taken by the lower appellate Court based upon the supposed intention of the plaintiff is obviously wrong. The plaintiff does not say that in every case there must be an independent agreement or an independent contract that the delivery and the tender should be dispensed with, but as elicited out in the cross-examination by the defendant himself, it is really the effect of entering into a cross-contract. It was elicited by the defendants' cross-examination that the practice in the market was to receive and pay the difference in prices on the voida (due) dates in cases of contracts and cross-contracts like this. The plaintiff continued :

"In cases of contracts and cross-contracts between the same parties, it was never the practice to give and take delivery according to the term of the respective contracts. Such contracts are, usually settled by payment of difference in prices. In such cases, actual delivery is not insisted on, because it involves unnecessary trouble."

(The better expression would be 'useless trouble'.) Then the plaintiff stated that he had paid and received difference in prices in cases of similar contracts and cross-contracts. In answer to a question from me, the respondent's learned counsel admitted that his client has not given evidence of any instance in which actual delivery of the goods or tender thereof was insisted upon. I hold that the trial Court was right.

The decree of the lower appellate Court is reversed and that of the trial Court restored with costs here and in the lower appellate Court.

• (No leave.)

V.P.S.

Appeal allowed.

1. A.I.R. 1934 Bom. 91.

2. (1919) I.L.R. 46 Cal. 534 at 542.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kolluri Venkataratnamma

.. Appellant*

v.

Maradugula Narasimha Rao and others

.. Respondents.

Suits Valuation Act (VII of 1887), sections 9 and 11—Madras Civil Courts Act, section 12—Partition suit—Valuation for purposes of jurisdiction—Principles.

Where the value of the property covered by a will was stated in the will itself to be Rs. 8,000, and the plaintiff sued for a partition of the one-fourth share to which she was entitled thereunder,

Held, that the value of the suit was a one-fourth share in the property and the District Munsiff had jurisdiction to try the suit under section 12 of the Madras Civil Courts Act inasmuch as the plaintiff's prayer was only that the undivided one-fourth share should be converted into a divided one-fourth share, the value of the property before and after partition being the same.

* *Sukkira v. Palani*, I.L.R. (1938) Mad. 923, followed.

Under section 11 of the Suits Valuation Act, it is not open to the parties to question the jurisdiction of the trial Court in second appeal.

Appeals against the decrees of the Court of the Subordinate Judge, Rajahmundry, in A.S. No. 65 and 64 of 1942, preferred against the decree of the Court of the District Munsiff of Rajahmundry in O. S. No. 69 of 1937 and 19 of 1941 respectively, etc.

The Advocate-General (*P. V. Rajamannar*), *K. Subba Rao* and *Kasturi Seshagiri Rao* for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT : *S. A. No. 703 of 1943*.—The suit out of which this appeal arises was one for a declaration that a certain will was true, valid, and binding on all parties concerned and for partition of the one-fourth share of the testator that had fallen to the plaintiff as a result of the will. The first Court found that the will was not executed by the testator while in a sound disposing state of mind, though a question of jurisdiction was also raised, which was decided in favour of the plaintiff. The appellate Court held that the will was genuine. The question of jurisdiction seems not to have been argued in the lower appellate Court; but in this Court, the decree of the lower appellate Court has been canvassed on two grounds, the first being that the finding of the lower appellate Court was not justified by the evidence; and the second being that the District Munsiff had no jurisdiction to try this suit.

The first point is a question of fact. It is argued that the conclusion is inconsistent with the evidence of the doctor who examined the testator 15 or 20 minutes after he is alleged to have executed the will; and it is said that if his evidence is accepted, then the will cannot be genuine. I however find that the evidence of the doctor is not specific on this point. He admits that it is possible that the testator may have become unconscious only a few minutes before he examined him. If so, it was possible that the testator was in a sound disposing state of mind at the time when the will is said to have been executed by him.

Under section 9 of the Suits Valuation Act, the High Court may make rules for valuing suits in cases where the subject-matter of the suit does not admit of being satisfactorily valued. According to the decision in *Ramaswami v. Rangachariar*¹ a partition suit is one of such suits; but I understand that the High Court has made no rules under section 9 of the Suits Valuation Act with regard to partition suits. Section 12 of the Madras Civil Courts Act, however, says that :

"The jurisdiction of a District Munsiff extends to all like suits . . . of which the amount or value of the subject-matter does not exceed Rs. 3,000."

The value of the property covered by the will is said in the will to be Rs. 8,000; and of that, the plaintiff is entitled under the will to a one-fourth share. The learned

* S. As. Nos. 703 and 704 of 1943 and
G. M. P. No. 2966 of 1944.

23rd August, 1944.

1. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).

advocate for the appellant contends that the subject-matter of the suit is the whole of the property which the plaintiff seeks to have divided ; because every bit of that land has to be divided. It seems to me, however, that the value of the suit is a one-fourth share in that land ; because the plaintiff asks that the undivided one-fourth share should be converted into a divided one-fourth share, the value of the property before partition and after being precisely the same. This was the view held by this Court in *Sukkira v. Palani*¹, where the learned Judges had to consider whether an appeal lay to the Privy Council. The value of the joint family property was more than Rs. 10,000 ; but the plaintiff's share was worth only Rs. 5,000 ; and it was held that the subject-matter of the suit was the plaintiff's share in the estate in the family property and not the value of the family property. The wording used in section 110 of the Civil Procedure Code is precisely that to be found in section 12 of the Madras Civil Courts Act, from which it follows that if the value of the property was Rs. 8,000, then the District Munsiff had jurisdiction to entertain the suit.

It is however argued that in fact the property was worth very much more ; and the evidence of the plaintiff's husband is referred to in support of that contention. The fact that one of the plaintiff's witnesses, even though that witness be her husband, happened to say in cross-examination that the value of the property is more than what the plaintiff stated in her plaint, would not oust the jurisdiction of the Court, unless an issue were raised whether the Court had jurisdiction and as the result of that issue, the Court gave a judicial finding that the subject-matter of the suit was beyond the jurisdiction of the Court. The District Munsiff found that he had jurisdiction and that a one-fourth share of the property would not exceed Rs. 8,000.

It would seem from section 11 of the Suits Valuation Act that it is not open to the appellant in second appeal to question the jurisdiction of the trial Court. It is however unnecessary for me to consider this question more fully ; because I have come to the conclusion that the trial Court had jurisdiction to try the suit. The appeal is dismissed with costs. . . .

V.P.S.

Appeal dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD THANKERTON, LORD WRIGHT AND SIR MADHAVAN NAIR.
All India Spinners Association of Mirzapur, Ahmedabad .. *Appellant**

v.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan

.. *Respondent.*

Income-tax Act (XI of 1922), section 4 (3) (b)—Scope and construction—The All India Spinners Association—How far one holding property in trust for charitable purpose—General public utility—Meaning.

The activities of the All India Spinners Association consisted in the acquisition of yarn, and also of raw cotton, which was then given out to various poor people to be spun by them into yarn, all of which yarn was then given out to other poor people for hand-weaving into cloth. The cloth so produced was then sold by the Association. The monies realised by the Association by such sales were a little more or less than the cost of production and overhead charges. When there was a surplus in the amount realised by the sales of cloth, such surplus was utilised in the same manner as the other funds of the Association, *inter alia* in getting yarn and cloth manufactured and providing wages for the persons engaged in such manufacture.

Clause (i) of the constitution of the Association established the Association as an organisation for the development of hand-spinning and khaddar. It was to be a permanent organisation, unaffected and uncontrolled by politics and though established with the consent of the All India Congress Committee as an integral part of the Congress Association, it was to have an independent existence and powers. Under clause 3 the funds and assets were to vest in the Board of Trustees who were also to be the executive council and to "hold the same for the purposes of the Association." There was no power to distribute surplus income among the members.

1. (1938) 2 M.L.J. 277 : I.L.R. (1938) Mad. 923.

* P. G. Appeal No. 64 of 1942.

27th June, 1944.

On a question as to the applicability of section 4 (3) (i) of the Income-tax Act to the income of the Association,

Held : (i) The limits fixed by the section must be strictly observed.

(ii) The statement of the object in clause (i) of the constitution which was the constituent and dominant provision excluded any question of profit making and also excluded any element of party politics. Any participation in political propaganda would be *ultra vires*. The primary object of the Association was the relief of the poor and the purposes of the Association included the advancement of other purposes of general public utility. [The words "general public utility" would exclude the object of private gain such as an undertaking for commercial profit though all the same it would subserve general public utility.]

(iii) Though economists might differ about the wisdom of some at least of the Association's purposes the Court could not hold that it was beyond the pale of legitimate charitable trusts.

(iv) The "property" of the Association consisted of the organisation and the undertaking as well as the fluctuating stock of yarn and was held by the Association in trust.

(v) Accordingly, the undertaking being a charity, the income of the Association was not liable to income-tax.

Roland Burrows, K.C. and C. J. Colombos for Appellant.

J. Millard Tucker, K.C. and L. M. Jopling for Respondent.

Their Lordships' Judgment was delivered by

LORD WRIGHT.—This is an appeal from an order dated 8th April, 1941, of the High Court of Bombay (Sir J. W. F. Beaumont, C.J. and Wadia, J.) answering adversely to the appellant a question contained in a reference under section 66 (3), Income-tax Act, 1922 (hereinafter called "the Act") made by the respondent dated 20th March, 1941. The year of assessment concerned is the year 1936-37 the relevant accounting year being the year ended 31st December, 1935. Throughout the accounting year and the year of assessment the appellant was an unregistered and unincorporated association of individuals. Its activities consisted in the acquisition of yarn, and also raw cotton, which was then given out to various poor people to be spun by them into yarn all of which yarn was then given out to other poor people for hand-weaving into cloth. The cloth so produced for the appellant was then sold by the appellant. During the relevant accounting year these activities resulted in a profit to the appellant. The appellant also had income from interest during the same year and the appellant was assessed to income-tax and super-tax for the year 1936-37 on the whole of such profit and income. The question at issue in this appeal is whether the appellant was for the year 1936-37, exempt from liability to income-tax and super-tax under section 4 (3) (i) of the Act, on the ground that the whole of the profit and income in question was "income derived from property held under trust or other legal obligation wholly for charitable purposes." This depends on the true construction as applied to the facts of the case of section 4 (3) (i) of the Act which is as follows :

"(3) This Act shall not apply to the following classes of income : (i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto In this sub-section 'Charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility."

The facts stated in the reference can be summarised as follows : The appellant was formed in the year 1925, and had its origin in a resolution of the All India Congress Committee passed in 1925. It was started for the purpose of the development of the village industry of hand-weaving (called "khadi") and the weaving of cotton material (called "khaddar") by the use of hand looms. The constitution of the appellant is set out in a document without date or signature (Ex. "G" of the record) which was contained in a publication by the appellant called the "Khadi Guide," published in 1931. Clause 1 of this document is in the following terms :

"Whereas the time has arrived for the establishment of an expert organisation for the development of hand-spinning and khaddar and whereas experience has shown that such development is not possible without a permanent organisation, unaffected and uncontrolled by politics, political changes or political bodies an organisation called the All India Spinners' Association is hereby established with the consent of the All India Congress Committee as an integral part of the Congress organisation but with independent existence and powers."

Certain of the other clauses of the document read as follows :

" Clause 2 (a). The said Association shall consist of members and associates and donors hereinafter defined and shall have a Board of Trustees who shall also be the Governing Body of the Association."

Clause 2 (b) also contains the names of the members of the Board of Trustees and Executive Council, which included Mahatma Gandhi and Pandit Jawaharlal Nehru:

" Clause 3. That the funds and assets now held by the All India Spinners' Association and its various branches shall vest in the Board of Trustees who shall also be the Executive Council of the Association, and they shall hold the same for the purpose of this Association."

Clause 4. The Council shall have the right to raise loans, to collect subscriptions, to hold immovable property, to invest funds under proper security, to give and take mortgage for the furtherance of hand-spinning and khaddar, to give financial assistance to khaddar organisations by way of loans, gifts or bounties, to help or establish schools or institutions where hand-spinning is taught, to help and open khaddar stores, to establish a khaddar service, to act as agency on behalf of the Congress to receive self-spun yarn as subscription to the Congress and to issue certificates and to do all the things that may be considered necessary for the furtherance of its objects, with power to make regulations for the conduct of affairs of the Association of the Council and to make such amendments in the present constitution, as may be considered necessary from time to time."

Later clauses of the constitution stated the conditions under which persons could become members of the Association. In particular they were to be over 18 years of age, habitually wearing khaddar, and depositing regularly with the Council each month 1,000 yards of self-spun yarn well-twisted and uniform. The method by which the appellant worked, and the manner in which its profits were earned were as follows : Out of the funds in its hands which have mostly been contributed by donations from the public and subscriptions from the members of the Association, the Association buys charkhas and handlooms, and supplies them to the inhabitants of villages within the limits of the various branches of the Association free of charge and further buys raw cotton and gives the same to the said persons for the purpose of spinning yarn from such cotton. The Association gives a certain wage to the said persons which, in some cases, is the sole source of income to those persons and in others adds to the earnings of the said persons so as to enable them to maintain and support their families. The yarn so spun is taken over by the Association and supplied to the other persons for weaving cloth on handlooms. The Association also buys hand-spun yarn from the said persons who have spun the same out of their own raw cotton, paying them for the same on the basis of the cost of the raw cotton and the wages for spinning the same into yarn. The persons to whom all the yarn is handed over for weaving are also paid a certain wage sufficient either in itself or as an addition to the other income of the persons to maintain and support their families. The wages so paid to the spinners and weavers are not based on the current wages prevailing for similar work but are fixed on the basis of giving to the said persons as far as possible an income sufficient to enable them to support their families. The cloth so woven is taken over by the Association and is sold in the khaddar stores established by the Association in various centres by the branches of the Association. The price charged to the public for such cloth is calculated on the basis of the cost price incurred by the Association in the manner hereinbefore stated plus a certain percentage for shop and overhead charges, without any reference to or connexion with the demand for the same and the price of similar mill cloth sold in the market. In the ordinary course, the monies realised by the Association by such sales are a little more or less than the cost calculated on the aforesaid basis. When there is a surplus in the amount realised by the sale of cloth, such surplus is utilised in the same manner as the other funds of the Association *inter alia* in getting yarn and cloth manufactured and providing wages for the persons engaged in such manufacture. The Commissioner duly referred the following question with his opinion to the High Court :

" Whether having regard to the objects of the Association and the manner in which they are carried out and the purpose for which its funds are applied, the income of the Association is liable to income-tax and/or super-tax."

His opinion was in substance that the dominant purpose of the Association was political and therefore not charitable and that it was in any event not a charitable purpose, the object of the Association being the promotion and organisation of the hand-spinning and weaving industry which was carried out on a strictly trading basis and was in no way different from the activity of a trading concern. The wages paid to the workers were based on the work they did and not on their needs. The object he thought was not the relief of the poor, nor was the object one of general public utility. At most only a section of the general public could benefit from it. On the reference coming before the High Court in Bombay, constituted by the Chief Justice and Wadia, J., they answered the question in the affirmative. They based their decision on the ground that assuming as they did for the purpose of the case that the object was the relief of the poor, it still did not fall within section 4 (3) of the Act, because the income was not derived from property held under trust or other legal obligation, for religious or charitable purposes. There was, they held, no trust deed nor any clear declaration of trust, and hence no legal obligation to dispose of the income for the purpose of getting yarn and cloth manufactured, and providing wages for the persons employed in the manufacture, though that had been the practice followed throughout by the appellant. On that ground alone they held that section 4 (3) did not apply; Wadia, J., however said:

"If an Association is set on foot by a political organisation and is connected with it but still has for its real object the relief of poverty, its connexion with the political organisation does not in my opinion make its real object any the less charitable."

Their Lordships agree with that opinion. Their Lordships, however, do not feel able to concur in the decision of the High Court. In their judgment the appellant has brought itself within the exemption contained in section 4 (3) (i), Income-tax Act, 1922. They hold that the income sought to be assessed is income derived from property held under trust or other legal obligation wholly for religious or charitable purposes on the basis of the statutory provision that "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility. It is now recognised that the Indian Act must be construed on its actual words and is not to be governed by English decisions on the topic. The English decisions on the law of charities are not based upon definite and precise statutory provisions. They have been developed in the course of more than three centuries of the Chancery Courts. The Act of 43 Elizabeth (1601) contained in a preamble a list of charitable objects which fell within the Act, and this was taken as a sort of chart or scheme which the Court adopted as a ground work for developing the law. In doing so they made liberal use of analogies so that the modern English law can only be ascertained by considering a mass of particular decisions often difficult to reconcile. It is true that section 4 (3) of the Act has largely been influenced by Lord Macnaghten's definition of charity in *Pemsel v. Commissioners for Special Purposes of Income-tax*¹, but that definition has no statutory authority and is not precisely followed in the most material particular; the words of the section are "for the advancement of any other object of general public utility" whereas Lord Macnaghten's words were "other purposes beneficial to the community." The difference in language, particularly the inclusion in the Indian Act of the word "public" is of importance. The Indian Act gives a clear and succinct definition which must be construed according to its actual language and meaning. English decisions have no binding authority on its construction and though they may sometimes afford help or guidance, cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life.

The judgment appealed from treated the problem under two main headings: (1) was there a trust or other legal obligation under which the property from which the income was derived was held; (2) was that trust a legal obligation for the relief of the poor or for any other object of general public utility? In dealing

with these questions it is in their Lordships' opinion necessary to examine the constitution of the appellant Association. It is true that it is an unincorporated body of individuals, but it is assessable and chargeable as such under section 3 of the Act, as amended by the Indian Income-tax (Amendment) Act, 1930, which includes every individual, Hindu undivided family, company, firm and other association of individuals as taxable.

Clause (1) of the constitution establishes the Association as an organisation for the development of hand-spinning and khaddar. This is the dominant object and purpose of the Association. It is to be a permanent organisation; unaffected and uncontrolled by politics, and though established with the consent of the All-India Congress Committee as an integral part of the Congress Association, it is to have independent existence and powers. The statement of the object excludes in their Lordships' opinion any question of profit-making and also excludes any element of party politics. Any participation in political propaganda would be *ultra vires*. Under clause (3) "the funds and assets" then held by the All-India Spinners Association were to vest in the Board of Trustees; who were also to be the executive Council and "to hold the same for the purposes of the Association." Clause (4) defines the powers of the Council of the Association, which is to have independent existence and "they are to do all things which may be necessary for the furtherance of its objects." There is of course a special provision enabling the Council to act as an agency on behalf of the Congress to receive self-spun yarn as subscriptions to the Congress, but that has been rightly regarded as a separate and independent matter, apart from the general object of the Association and not affecting its freedom from political purposes. There is no power to distribute any surplus income among its members. By clause (20) every person wishing to join the Association must sign an application to be enrolled stating that he has read the rules and forwarding his subscription. On a fair construction of the constitution, their Lordships cannot agree with the opinion of the learned Judges that no trust or legal obligation is shown binding the Association or its trustees or Council to devote the property of the Association from which the income is derived to the charitable purposes for which the Association was formed, assuming for the moment that the purposes were charitable within the meaning of the Act. It is not really questioned that the practice has been to use the surplus income for the purposes of the Association and that the business has been carried on in pursuance of the primary purpose in addition mainly by beneficiaries of the Association. The practice however is not enough. The purpose is to be ascertained from the constitution. In their Lordships' judgment its provisions already quoted show a trust or binding obligation so to carry it on. The constitution is a written instrument, the terms of which bind not only the trustees and Council, but the members who by their application for membership accept its rules. Any departure either by the trustees or Council or members from the rules would be a breach of trust or legal obligation which the Court could restrain. A formal deed is not necessary to constitute a trust, still less to constitute a legal obligation binding the trustees, the Council and the members *inter se*. Their Lordships hold that there is such a trust or at least that there is a legal obligation, which is all that the section requires. It is true that the rules may be altered by the unanimous agreement of all the members. But that is immaterial so long as the rules remain unaltered. The High Court have, it seems, attached too much importance to clauses (3) and (4) of the constitution and not sufficient importance to clause (1), which is the constituent and dominant provision.

On that footing a question was suggested that the property of the Association from which the profits were derived was not "held" within the meaning of the section. But clause (3) provides expressly that the funds and assets of the Association are to vest in the trustees, to be held for the purposes of the Association.

The High Court seem to have been of opinion that the property from which the profits were derived was the cloth which from time to time was sold. Their Lordships, however, prefer the view implied in the decision of the board in *Tribune Press, Lahore v. Commissioner of Income-tax*,¹ to which fuller reference will be later made, where the "property" in question was the stock and goodwill of the press and newspaper. Here the property consisted of the organisation and the undertaking as well as in the fluctuating stock of yarn and cloth.

So far the case seems to fall within the exemption of the section. The second and more important point is whether the undertaking is a charity. Their Lordships are fully conscious of the importance of applying correct principles in such a matter and do not repeat the reasons for caution stated by the board in *Tribune Press, Lahore v. Commissioner of Income-tax*.¹ The limits fixed by the section must be strictly observed and its definition must be satisfied by the character of the Association and its activities. Whether that is so depends on the true construction of the section and on the meaning and effect of the constitution which defines the character of the Association. The construction of the section is obviously a question of law, but so also is the question what is the real purpose of the Association. The Court must make its decision on the latter point on the basis of the facts found for it, but given the facts the question is one of law. In this particular case the principal fact is the constitution, the true construction of which is again a question of law. The High Court were prepared to assume (in the words of Wadia, J.) that

"the real underlying object of the Association was to benefit the poor agriculturists in the villages, specifically at that time of the year when they were not actively engaged in agricultural operations."

The Judges in India with their knowledge of Indian conditions are peculiarly qualified to form an opinion on these matters. But their Lordships see no sufficient reason to doubt the conclusion that the primary object of the Association was the relief of the poor. That would be enough *prima facie* to satisfy the statute. But there is good ground for holding that the purposes of the Association included the advancement of other purposes of general public utility. These last are very wide words. Their exact scope may require on other occasions very careful consideration. They were applied in *Tribune Press, Lahore v. Commissioner of Income-tax*,¹ without any very precise definition to the production of the newspaper in question under the conditions fixed by the testator's will. The board stated (at page 256) that

"the object of the paper might be described as the object of supplying the province with an organ of educated public opinion"

and that it should *prima facie* be held to be an object of general public utility. These words their Lordships think would exclude the object of private gain, such as an undertaking for commercial profit though all the same it would subserve general public utility. But private profit was eliminated in this case. Though the connexion in one sense of the Association with Congress was relied on as not consistent with "general public utility" because it might be for the advancement primarily of a particular party, it is sufficiently clear in this case that the Association's purposes were independent of and were not affected by the purposes or propaganda of Congress. Nor is there any ground for the Court holding that the scheme is not one which "may be" for the public benefit. The Court might in proper cases refuse to admit as charitable schemes, purposes eccentric or impracticable. But though economists might differ about the wisdom of some aspect at least of the Association's purposes, the Court could not hold that it was beyond the pale of legitimate charitable trusts. This general line of reasoning seems to accord with that of the board in *Tribune Press, Lahore v. Commissioner of Income-tax*.¹ The English cases there cited do not turn on the words "general public utility," but they illustrate how Courts of first instance in England have actually dealt with the particular questions there submitted to them. Their

1. (1939) 2 M.L.J. 444 : L.R. 66 I.A. 241 at p. 250 : I.L.R. (1939) Lah. 475 (P.C.).

Lordships are of opinion that the appeal should be allowed and the question submitted to the Court answered in the negative. The respondent will pay the appellant's costs of this appeal and of the proceedings below. They will humbly so advise His Majesty.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Solicitor, India Office.*

K. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SHAHABUDDIN.

Mummidi Pattabhiramayya

*Petitioner**

v.

Badam Subba Rao and others

Respondents.

Award—Suit on—Award unregistered though registrable under section 17 of the Registration Act—Award not a contract—Section 30, Specific Relief Act, not applicable.

An award is not a contract. Section 30 of the Specific Relief Act only says that an award can be enforced in the same manner as contracts and that does not amount to saying that an award is a contract. So where an award which is registrable under section 17 of the Registration Act has not been so registered the award is inadmissible in evidence and a suit based on the award cannot be regarded as a suit for specific performance of a contract.

Sornavalli Ammal v. Muthayya Sasthigal, (1900) 10 M.L.J. 208 : I.L.R. 23 Mad. 593 and *Devi Bhagavathi v. Tadipatri Veeravadhantha*, (1909) 20 M.L.J. 79 : I.L.R. 33 Mad. 246, relied on.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Coconada dated 15th March, 1943, in S.C.S. No. 84 of 1942.

D. Narasaraju for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition arises out of the judgment of the learned Subordinate Judge of Coconada in S.C.S. No. 84 of 1942. That was a suit based on an award. The plaintiff prayed for a decree for Rs. 583-14-0 on the ground that the dispute between himself and the defendants was referred to one Venkatakrishna Rao who after hearing the evidence of both parties gave an award on 8th August, 1939, to the effect that the defendants should pay the plaintiff Rs. 600 by way of compensation and that the sum of Rs. 50 payable by the plaintiff to the second defendant under a promissory note should be deducted from that amount. According to the plaint the dispute was this. The defendants had leased their lands to the plaintiff and one Venkataramayya for a period of five years. Subsequently by reason of an agreement between the plaintiff and Venkataramayya, the latter went out of the land and the plaintiff alone cultivated the entire land as the sole tenant. With a view to sell the lands the defendants asked the plaintiff to give up possession. The plaintiff did not agree to that course. The award in respect of this dispute was to the effect that the person who passed the award had considered the evidence and the justice of the case and come to the decision already referred to. The defendants filed a written statement admitting the lease but they alleged that the lease deed contained a provision that in case of alienation by the lessors, the lessees should give up the remaining portion of the lease. With regard to the award, they took up the position that it was not valid and enforceable. At the time of the trial they took the further objection that the award not having been registered as required under section 17 of the Indian Registration Act, was inadmissible in evidence. The learned Subordinate Judge upholding this contention dismissed the suit. He came to the conclusion that as the award purports to extinguish the right of the plaintiff in the land as its lessee and created a right in the defendants and as the property was worth more than Rs. 100 it was governed by section 17 of the Registration Act and should have

* C. R. P. No. 857 of 1943.

been registered. He therefore held that the award was inadmissible under section 49 of the Registration Act.

Learned counsel for the petitioner concedes that the award is registrable under section 17 but he argues that the fact that it has not been so registered does not make it inadmissible in view of the proviso to section 49 which runs as follows:

"Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under chapter II of the Specific Relief Act, 1877"

His argument is this. Under section 30 of the Specific Relief Act, the provisions of Chapter II as to contracts, shall *mutatis mutandis*, apply to awards and therefore an award should be considered to be on the same basis as a contract and in that sense the proviso is applicable to this case and the suit should be regarded as a suit for specific performance of a contract. The Small Cause Court has no doubt no jurisdiction to try such a suit. The learned Judge therefore should not have dismissed it but returned the plaint for presentation to the proper Court.

I am unable to accept these contentions. As argued on behalf of the respondents, an award is not a contract. Section 30 which is relied on on behalf of the petitioner says only this, that the award can be enforced in the same manner as a contract. That does not amount to saying that an award is a contract. In a decision of this Court in *Sornavalli Ammal v. Muthayya Sastrigal*¹ relied on by learned counsel for the respondents, the argument with regard to section 30 of the Specific Relief Act was put forward on the question whether the suit to enforce an award was barred by limitation. In dealing with this argument, the learned Judges observed as follows:—

"It is true that section 30 of the Specific Relief Act directs that the provisions of chapter II of that Act shall apply to awards. It cannot on that ground be contended that awards are contracts, because it would have to be similarly contended that directions in a will or codicil to execute a particular settlement, which are included in the same section, are also contracts, which would be absurd."

The same view was taken in *Devi Bhagavali v. Tadpatri Veeravadhanta*.² The learned counsel for the petitioner has not cited any decision supporting his position.

I therefore see no reason to interfere. The petition is dismissed with costs.

K. C.

Petition dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE CHANDRASEKHARA AIYAR AND MR. JUSTICE SHAHABUDDIN.

*In the matter of a Pleader.**

Legal Practitioners' Act (XVIII of 1879)—Pleader appearing for Official Receiver—Alleged misappropriation of funds—Criminal prosecution ending in acquittal—Effect—Negligence—Whether amounts to misconduct.

The two respondents who were pleaders practising at Tirupur and Coimbatore respectively were instructed by the Official Receiver of Coimbatore to institute certain legal proceedings on his behalf. The charge against the first respondent was to the effect that he had withdrawn monies from Court in cases entrusted to him and that he had utilised the amount for his own purposes. The second charge which applied to both the respondents was that they were guilty of "professional misconduct and grossly negligent and improper conduct" in that they had allowed various suits in which they were instructed to appear to be dismissed for default without intimation to the Official Receiver and without his instructions. With regard to the first charge it transpired in the course of the enquiry that the first respondent had been charged in a Criminal Court with misappropriation of the monies, and that he was found not guilty both by the trial and appellate Courts.

Held, that as regards the first charge the finding of the Criminal Court that the first respondent was not guilty should be accepted in the proceedings under the Legal Practitioners' Act.

1. (1900) 10 M.L.J. 208 : I.L.R. 23 Mad. 593.

2. (1909) 20 M.L.J. 79 : I.L.R. 33 Mad. 246

* R. C. No. 37 of 1944.

11th September, 1944.

Held further, that the second charge levelled against both the respondents was merely one of negligence and that it did not amount to professional misconduct.

The Advocate-General (*P. V. Rajamannar*) in support of the notice.

K. Rajah Ayyar, C. D. Venkataraman and S. S. Ramachandra Ayyar for Respondents.

The Judgment of the Court was delivered by*

The Chief Justice.—The first respondent is a pleader practising at Tiruppur. The second respondent is a pleader practising at Coimbatore. They were instructed by the Official Receiver of Coimbatore to institute certain legal proceedings on his behalf. The first respondent was concerned with proceedings at Tiruppur and the second respondent with cases at Coimbatore. They have been charged with professional misconduct. Two charges were framed. The first charge, which only applied to the first respondent, was to the effect that he had withdrawn moneys from Court in cases in which he was appearing on behalf of the Official Receiver, Coimbatore, and that he utilized them for his own purposes. The second charge which applied to both the respondents was that they were guilty of "professional misconduct and grossly negligent and improper conduct" in that they had allowed various suits in which they were instructed to appear to be dismissed for default without intimation to the Official Receiver and without his instructions. The second charge is merely one of negligence, and negligence does not amount to professional misconduct. The District Munsif who held an inquiry gave a decision to this effect. With regard to the first charge it transpired in the course of the inquiry that the first respondent had been charged in a Criminal Court with misappropriation of these moneys. He had been found not guilty and on appeal this decision had been concurred in by this Court. As the first respondent has been acquitted in a Criminal Court, this Court must accept the decision. There is a definite finding in regular proceedings that the first respondent has not misappropriated these moneys and that has to be accepted.

The result is that the second charge against both the respondents and likewise the first charge against the first respondent are dismissed.

B. V. V.

Charges dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Ummaji Javichand Firm of Guntur and another .. *Appellants**

v.

Rao Bahadur Ravula Subbarao Garu, represented by his general power of attorney agent Hariprasada Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 144 and 151—Restitution—Execution of decree—Rateable distribution of sum deposited—Suit by third party—Attaching creditor giving up rights under prior execution—Application to recover monies rateably distributed—Maintainability—Regular suit as proper remedy.

The first respondent filed a suit in the Court of the Subordinate Judge, Bapatla, against the minor sons of one R for recovery of a sum of money due by them under the pious obligation rule of Hindu law. He obtained a decree and attached the judgment-debtors' interest in certain properties belonging to the family. An auction was held and the decree-holder purchased the interest of the judgment-debtors for a certain amount which he paid into Court. The judgment-debtors applied under Order 21, rule 90 of the Code of Civil Procedure for an order setting aside the sale. The application was dismissed because they failed to comply with the requirements of the rule, and the sale was confirmed. Certain other creditors who had attached the judgment-debtors' interest in the properties applied for rateable distribution and their application was granted. Notwithstanding the provisions of Order 21, rule 92, the judgment-debtors filed a suit in the Court of the District Munsiff of Bapatla for a declaration that the sale was void by reason of material irregularity. In that suit the only party impleaded was the auction-purchaser. The suit was dismissed by the Munsiff but in appeal the first respondent did not oppose and it was allowed. It appeared that a few days

* A. A. O. Nos. 469 and 668 of 1943.

after the appeal was allowed another suit filed by a mortgagee of the judgment-debtors was compromised whereby the first respondent gave up his rights under the attachment which he had obtained in execution of his own decree receiving as compensation a second charge for a certain amount on the properties which he had bought at the auction. Subsequently the first respondent applied to the Subordinate Judge for an order directing the creditors who had obtained rateable distribution to pay into Court the amounts which they had received. The Court held that the case did not fall within section 144 of the Civil Procedure Code but that restitution could be ordered under section 151.

Held, in appeal, that the case was not one to which the provisions of section 151 of the Code could be applied, and that the remedy of the first respondent, if any, was by a regular suit.

Raja Rao v. Ananthanarayana Chetti, (1921) 42 M.L.J. 308; *Rego v. Ananthamathi*, (1942) 1 M.L.J. 575; I.L.R. (1942) Mad. 949 and *Jai Barham v. Kedarnath Marwari*, (1922) 44 M.L.J. 735; L.R. 49 I.A. 351; I.L.R. 2 Pat. 10 (P.C.), considered.

Appeals against the orders of the Court of the Subordinate Judge, Bapatla, dated 12th November, 1942 and made in E.A. No. 136 of 1941 in O.S. No. 64 of 1934.

P. Somasundaram, M. S. Ramachandra Rao and D. R. Krishna Rao for Appellants.

P. Satyanarayana Rao and B. S. Ramachandra Rao for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in these appeals is whether the lower Court had the power to order restitution on a petition or whether it should have relegated the petitioner to a regular suit.

In O. S. No. 64 of 1934 in the Court of the Subordinate Judge of Bapatla the first respondent sued Venkataratnarao and Kamaraju, the minor sons of one Ramakoteswara Rao, for the recovery of a sum of money due by them under the pious obligation rule of Hindu law. He obtained a decree and attached the judgment-debtors' interest in certain properties belonging to the family. An auction was held on the 1st December, 1936, and the decree-holder purchased the interest of the judgment-debtors for a sum of Rs. 2,363, which he paid into Court. The judgment-debtors applied under Order XXI, rule 90 of the Civil Procedure Code for an order setting aside the sale. The application was dismissed because they failed to comply with the requirements of the rule. On the 28th September, 1937, the sale was confirmed. There were other creditors who had attached the judgment-debtors' interest in these properties and they applied for rateable distribution of the Rs. 2,363. Their applications were granted and the money was paid out rateably.

Notwithstanding the provisions of rule 92 of Order XXI the judgment-debtors filed a suit (O.S. No. 77 of 1937) in the Court of the District Munsif of Bapatla for a declaration that the sale was void by reason of material irregularity. The District Munsiff rightly held that the suit did not lie and dismissed it on the 23rd December, 1939. The only contesting defendant in the suit was the first respondent, the auction-purchaser. The creditors who obtained rateable distribution of the Rs. 2,363 were not made parties. The judgment-debtors appealed to the Subordinate Judge. This appeal (No. 92 of 1940) was decided on the 17th April, 1940, and was allowed. Certain reasons were given by the Subordinate Judge for his decision; but we cannot accept them as valid grounds for his decision. The first respondent did not support the judgment of the District Munsif and this was in all probability the deciding factor.

The reason why the first respondent did not oppose the appeal is made plain by what happened in O.S. No. 32 of 1937 in the Court of the Subordinate Judge of Bapatla. That suit was filed by one Kuppuswami Chowdhuri against the judgment-debtors, their father and the first respondent to enforce a mortgage which he held over the properties attached by the first respondent in execution of his decree in O.S. No. 64 of 1934 and other properties belonging to the family. On the 20th April, 1940, that is, three days after App. No. 92 of 1940, had been allowed, a decree was passed by consent in O.S. No. 32 of 1937 and under it the first respondent gave up his rights under the attachment which he had obtained in execution of his own decree, receiving as com-

pensation a second charge for the sum of Rs. 4,000 on the properties which he had bought at the auction held on the 1st December, 1936. The decree also provided that Kuppaswami Chowdhuri the mortgagee decree-holder should proceed first against the other properties of the family. There can be no doubt that the first respondent surrendered the rights which he had obtained in the execution proceedings because he was given security for the payment of Rs. 4,000.

In E.A. No. 136 of 1941 the first respondent applied to the Subordinate Judge for an order directing the creditors who had obtained rateable distribution of the Rs. 2,363 to pay into Court the amounts which they had received. The application purported to be under sections 144 and 151 of the Civil Procedure Code. The application was successful and this has led to the institution of the two appeals now before us. C.M.A. No. 469 of 1943 has been filed by a creditor who received Rs. 346-3-6 out of the Rs. 2,363 and C.M.A. No. 668 of 1943 by a creditor who drew Rs. 563-12-0. They were the fourth and seventh respondents respectively in the first respondent's application for restitution. The Subordinate Judge considered that the matter was governed by the decision of this Court in *Rego v. Ananthamathi*¹. He held that the case did not fall within section 144, but he was of the opinion that he could make the order asked for by reason of the inherent powers of the Court reserved by section 151. We shall discuss *Rego v. Ananthamathi*¹ presently, but before doing so it will be convenient to refer to certain other cases which were quoted in the course of the arguments. These are *Raja Rao v. Ananthanarayana Chetti*², *Macha Koundan v. Kottara Koundan*³ and *Jai Barham v. Kedarnath Marwari*⁴.

The facts in *Raja Rao v. Ananthanarayana Chetti*², which was decided by a Division Bench were these. Certain properties were attached in execution proceedings and brought to sale. The purchase consideration was paid by the successful bidders into Court and was rateably distributed among other creditors of the judgment-debtor. The sons of the judgment-debtor, who had objected in the execution proceedings to the properties being sold on the ground that they belonged to a trust, brought a suit to establish this claim. The decree asked for was granted and the plaintiffs recovered possession of the properties. The auction-purchasers then applied for an order for the refund of the purchase moneys which had been paid out to the other creditors of the judgment-debtor. The question before the Court was whether section 144 applied and if it did not, whether section 151 could be invoked in order to obtain a refund of the moneys paid out to the creditors. It was held that section 144 did not apply because the decree under which the sale had taken place had not been varied. The Court considered that section 151 could not be called in aid because that section had been inserted in the Code in order to meet the ends of justice to prevent an abuse of the process of the Court. It should not be invoked to obtain an order which only sets right one injustice by the infliction of another.

The case of *Macha Koundan v. Kottara Koundan*³ was decided by a Full Bench. A mortgagee sued to enforce his mortgage and obtained a decree for sale. His legal representative instituted proceedings in execution of the decree and in the sale which followed the property was purchased by the respondent for a sum of Rs. 825. The mortgagor was a member of a tarwad, the junior members of which sued for a declaration that the decree and the sale were not binding on them. They further claimed that they were entitled to be put in possession of the property. This suit was successful. The respondent as the auction-purchaser then filed an application under sections 47, 147 and 151 of the Civil Procedure Code for a refund of the purchase money. The question raised was whether he was entitled to an order on a petition or whether he was

1. (1942) 1 M.L.J. 575 : I.L.R. (1942) Mad.

2. (1921) 42 M.L.J. 308.

3. (1935) 69 M.L.J. 750 : I.L.R. 59 Mad.

202 (F.B.).

4. (1922) 44 M.L.J. 735 : L.R. 49 I.A. 351 : I.L.R. 2 Pat. 10 (P.C.).

bound to institute a regular suit. The Court held that the remedy was by suit and not by application. The principal judgment was delivered by Ramesam, J., who summarised his conclusions in the following words:

"The result is in a case where the sale is set aside in execution by an application under rules 89, 90 or 91, the auction purchaser can obtain a refund on an application under Order 21, rule 93 of the Civil Procedure Code. But where the sale turns out to be futile by a finding in another suit, the only remedy that the party has is a regular suit and not an application under Order 21, rule 93. There may be defences in that suit, e.g., that the case was not properly conducted and that the finding is not binding."

The Subordinate Judge considered that the judgment of the Full Bench did not apply in the present case because the auction-purchaser was not the decree-holder but a stranger. For the appellants it is contended that the distinction drawn by the Subordinate Judge has no real bearing.

The Privy Council decided *Jai Barham v. Kejarnath Marwari*¹. There the property had been sold in execution and the sale confirmed, but the sale had been set aside in an earlier appeal to the Judicial Committee. Some of the properties of the judgment-debtors were encumbered and some were unencumbered. The unencumbered properties were three-eighths of the whole and the encumbered properties five-eighths. The decree-holders attached three-eighths of the encumbered properties, but by mistake the Court sold three-eighths of the unencumbered properties and confirmed the sale, as did the Calcutta High Court but on appeal to the Privy Council their Lordships held that the sale must be set aside. The purchasers at the auction had paid the amount of their bid, Rs. 1,12,000 into Court. There were other creditors of the judgment-debtors who held decrees and they attached this money, which was in due course paid out to them. Having won their appeal to His Majesty in Council, the judgment-debtors applied for an order for possession of the properties by way of restitution. The auction-purchasers were in possession and they contended that they could not be compelled to vacate without recovering their money. This contention was accepted by the Patna High Court which then had jurisdiction and the High Court's decision was concurred in by the Privy Council. The Judicial Committee held that the judgment-debtors could not get possession until they had paid the auction-purchasers the difference between Rs. 1,12,000, and the amount which had been received by the auction-purchasers in mesne profits during the period of their possession. Their Lordships said that the auction-purchasers had parted with their purchase money by paying into Court on the faith of the order of confirmation and the certificate of sale. This money had been distributed amongst the other creditors and it would be inequitable and contrary to justice that the judgment-debtors should be restored to the property without making good to the auction-purchasers the moneys which had been applied for their benefit. Their Lordships rejected the suggestion that the auction-purchasers should look to the creditors to whom the Rs. 1,12,000 had been paid. In coming to this conclusion their Lordships undoubtedly had regard to the inherent powers of the Court. The facts were however very different from the facts in the present case.

We now turn to *Rego v. Ananthamathi*². The suit there was on a mortgage which had been executed by one member of a joint family. The plaintiff said that the properties mortgaged constituted the separate estate of the mortgagor and obtained a decree on this basis. The properties were sold in execution, but in order to prevent the sale being confirmed the other co-parceners paid into Court the purchase price, the sum of Rs. 11,470, the amount required by Order XXI, rule 89. In the circumstances they were entitled to have the sale set aside and an order to this effect was passed. Another creditor of the mortgagor attached Rs. 9,000 of the Rs. 11,470 and the amount was paid out to him. The other co-parceners appealed against the decree which had been passed in

1. (1922) 44 M.L.J. 735: 49 I.A. 351; I.L.R. 2 Pat. 10 (P.C.).

2. (1942) 1 M.L.J. 575: I.L.R. (1942) Mad. 949.

favour of the mortgagee and the appellate Court held that the decree was not binding on the appellants as the properties belonged to the family. Thereupon they applied by a petition for an order on the attaching creditor for the restitution of Rs. 9,000. The Court recognised that section 144 of the Civil Procedure Code did not apply but considered that section 151 enabled a Court to recall money paid out by it to a person not entitled to it. They did not, however, decide whether the equities were such as to entitle the petitioners to an order. They sent the case back to the executing Court to consider and decide the question. The judgment in *Rajarao v. Ananthanarayana Chetti*,¹ was distinguished on the ground that the facts there were very different.

We are not called upon in these appeals to decide whether *Rajarao v. Ananthanarayana Chetti*¹ and *Rago v. Ananthamathi*², can stand together and if not which is to be preferred, nor need we pause to consider how far the judgment of the Privy Council in *Jai Barham v. Kedarnath Marwari*,³ really goes. We will assume for the purpose of deciding these appeals that a Court can in a case to which section 144 does not apply invoke section 151 when the equities demand it. But this is not such a case. So far as the equities are concerned the appellants have far the better case. As we have pointed out, the first respondent did not oppose the appeal (No. 92 of 1940). He allowed the sale to be set aside when the judgment-debtors were not entitled to this and he did so because of the advantage which he was to receive under the decree to be passed by consent in O.S. No. 32 of 1937. We are not prepared on an application which does not fall within section 144 to allow him to recover from the appellants what they received of the Rs. 2,363 under the order of the executing Court. As indicated in *Macha Koundan v. Kottara Koundan*,⁴ the appellants in a regular suit filed would have an opportunity of showing that the appeal (No. 92 of 1940) should not have been allowed. We are firmly of the opinion that it is not a case in which section 151 should be applied and that the first respondent's remedy, if he has one, is by a regular suit to which he must be relegated.

The appeals are allowed with costs here and below.

B. V. V.

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kanniya Rao

*Petitioner.**

Madras City Police Act (III of 1888), section 75—Gist of offence under—Accused need not be both "drunk" and "disorderly" to sustain a conviction.

"Being drunk and incapable of taking care of oneself" is an offence in itself and "being found guilty of riotous or disorderly or indecent behaviour in any public place or in any place of public amusement" is another and distinct offence under section 75 of the Madras City Police Act. Accordingly it cannot be said that a person cannot be convicted under that section unless he has been found to be both drunk and disorderly.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Bench of the Honorary Presidency Magistrates of the Court of the Presidency Magistrates, Egmore, Madras in N. C. 19371 of 1942 dated 20th January, 1943.

P. Radhakrishnayya for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) for Crown.

The Court made the following

1. (1921) 42 M.L.J. 308.

2. (1942) 1 M.L.J. 975 : I.L.R. (1942) Mad.

3. (1922) 44 M.L.J. 735 : 49 I.A. 351 : I.

* Cr. R. C. No. 55 of 1943.

(Cr. R. P. No. 52 of 1943).

L.R. 2 Pat. 10 (P.C.).

4. (1934) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.).

ORDER.—The case against the petitioner was that he assaulted the complainant because the complainant had informed against him. The accused was charged under section 75 of the City Police Act and was found guilty by a Bench of Presidency Magistrates and sentenced to a month's rigorous imprisonment and a fine of Rs. 25 with one week's imprisonment in default. He was also bound over under section 106 of the Criminal Procedure Code.

The finding of fact that the accused assaulted P. W. 1 cannot be canvassed here in revision. It is however contended that a person cannot be convicted under section 75 of the City Police Act unless he has been found to be both drunk and disorderly and that as there is no evidence in this case and no finding that the accused was drunk his conviction was illegal. Section 75, however, does not say that only persons who are drunk and are found guilty of riotous or disorderly or indecent behaviour can be convicted. If that had been the meaning of section 75, it would have been worded "whoever being found drunk and incapable of taking care of himself is guilty of any riotous, disorderly or indecent behaviour" It therefore appears that being drunk and incapable of taking care of oneself is an offence in itself and that being found guilty of riotous or disorderly or indecent behaviour in any public place or in any place of public amusement . . . is another and distinct offence. The petitioner was therefore on the facts accepted guilty under section 75 of the City Police Act.

There are passages in this short judgment to which exception can be taken. The learned Magistrates did so word their order as to give cause for an argument that they considered that the onus of proving himself innocent lay upon the accused ; for they say "the accused has not put in any defence witness and so we believe the prosecution." Reading the judgment as a whole, however, I do not think that the learned Presidency Magistrates lost sight of the fact that the burden is always upon the prosecution to prove their case. The learned Magistrates have also referred to a previous conviction of the accused for keeping a bucket shop. There seems to be no evidence of that ; but I do not consider that this is very material ; for the previous trial of the petitioner was a relevant fact, in that it explained why he entertained animosity against the complainant and establishes the motives for the offence.

I therefore find no ground for interfering with the conviction of the petitioner.

The sentence is unduly severe for the offence of which the petitioner has been found guilty. He committed a petty assault, and yet has not only been fined Rs. 25 but has also been sentenced to one month's rigorous imprisonment. In addition to that, he has been bound over for a period of six months. It may be true that it is necessary to protect informers against the wrath and vengeance of those against whom they have informed, and it may therefore have been necessary either to have given the petitioner a small term of imprisonment or to have bound him over. I do not think that both were necessary ; and it seems as if the learned Magistrates in awarding this sentence have been influenced by the previous conviction of the petitioner for an entirely different kind of offence. The order binding the accused over will stand ; but the sentence will be reduced to the period of imprisonment already undergone, which I understand is about a week. The fine is cancelled. One week will be allowed for furnishing security.

K.S.

Sentence modified.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

A. T. S. Sankaralingam Pillai

*Appellant**

v.

Ramaswami Naicker and others

*Respondents.**

Civil Procedure Code (V of 1908), section 47—Decree-holder assigning his decree—Execution application by assignee—Decree-holder cannot appeal against order thereon.

Where a decree-holder has assigned the decree and the assignee who files an execution application does not appeal against the order thereon, the decree-holder though a "party" cannot appeal. The dispute is one between the decree-holder and his assignee and the remedy is by way of suit only.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin dated 31st July, 1943, and passed in A.S. No. 404 of 1942, preferred against the order of the Court of the District Munsiff, Tuticorin, dated 19th August, 1942, and made in E. P. No. 518 of 1941 in O. S. No. 351 of 1929.

S. V. Rama Aiyangar for Appellant.

A. Swaminatha Aiyar, C. S. Rajappa and C. R. Krishna Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is the original decree-holder in O. S. No. 351 of 1929 on the file of the District Munsiff's Court of Tuticorin. He assigned his decree in favour of one Ramaswami Naicker, the eighth respondent in this appeal. The other respondents are the judgment-debtors, and they were defendants 1 to 7 in the suit. E. P. No. 518 of 1941 out of which this appeal arises was filed by the assignee decree-holder, eighth respondent herein, for executing that decree. The amount due under the decree was more than Rs. 2,000 and the entire amount as stated in the decree was sought to be recovered. The judgment-debtors pleaded that the assignee decree-holder was not entitled to recover more than Rs. 503-6-8 as that was the amount that was claimed in the previous execution petition. The learned District Munsiff recognised the assignment in favour of the eighth respondent and held that the eighth respondent was entitled to recover the amount as claimed by him. On appeal the learned Subordinate Judge of Tuticorin held that the eighth respondent was not entitled to recover more than Rs. 503-6-8 and interest thereon in view of the fact that in the previous execution petition that was the amount that was claimed and the attempt made by the original decree-holder to have that corrected failed. He held that by the doctrine of constructive *res judicata* the assignee decree-holder who could be in no better position than his transferor was also barred by constructive *res judicata*. He accordingly modified the order of the first Court holding that the eighth respondent was entitled to execute the decree only to the extent of Rs. 503-6-8. The assignee decree-holder has not appealed. Instead he amended his execution petition and proceeded to execute the decree only for the smaller amount. This is clear from the petition as amended by him. But the original decree-holder who had already assigned his decree to the eighth respondent has filed this appeal questioning the correctness of the order of the learned Subordinate Judge. Respondents 1 to 7 raise a preliminary objection that the appeal does not lie at the instance of the appellant. It is stated that the appeal lies under section 47, Civil Procedure Code as the appellant is a party to the decree, but then the contest now is not as between the appellant and the judgment-debtors. The appellant having assigned his decree to the eighth respondent, it is the eighth respondent that has the right to execute the decree. The contest was as between the eighth respondent and these respondents 1 to 7. But the eighth respondent submitted to the order of the lower appellate Court, amended the petition accordingly and he has not filed any appeal. The question now therefore is only as between the appellant and the eighth respondent. It is therefore a dispute only as between a party and his representative. It was pointed out by a Full Bench of this Court in *Annamalai v. Ramaswami*¹, that section 47, Civil Procedure Code does not apply to a case where the dispute arises between a party and his own representative or between two persons who both represent the same party, and that the aggrieved party's remedy in such a case is by way of a suit. To the same effect is a later decision of this Court in *Bapanna v. Jaggiah*². In these circumstances it has to be found that the appeal by the appellant does not lie. It is accordingly dismissed with the costs of respondents 1 to 7 alone.

K. S.

Appeal dismissed.

1. (1941) 1 M.L.J. 45; I.L.R. (1941) Mad. 438 (F.B.).

2. (1943) 1 M.L.J. 271; A.I.R. 1943 Mad 407.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Calicut Bank, Ltd., (in liquidation) by Official Liquidators . . . *Appellant in A. O. and Petitioner in C.R.P.*

v.

Srimathi C. Radhalakshmi

. . . *Respondent in both.*

Madras House Rent Control Order, 1941—Execution proceedings with regard to possession of house property—Court must have regard to the provisions of the Order.

The Court must have regard to the provisions of the Madras House Rent Control Order, 1941, when deciding in execution proceedings an application with regard to the possession of a house property. Where the extension of a tenancy is by operation of statute the Court is not concerned with the lack of merit in the tenant or of the hardship caused to the landlord.

Appeal against the order of the Court of the Subordinate Judge of South Malabar dated 5th July, 1943, and made in E. A. No. 441 of 1943 in O. S. No. 25 of 1938.

R. Rajeswara Rao instructed by Messrs. John and Row for Appellant-Petitioner.

S. R. Subramanyan for Respondent in both.

The Judgment of the Court was delivered by

The Chief Justice.—The question here is whether a Court must have regard to the provisions of the Madras House Rent Control Order, 1941, when deciding in execution proceedings an application with regard to the possession of house property.

In Original Suit No. 25 of 1938, in the Court of the Subordinate Judge of South Malabar the P. & O. Banking Corporation, Limited, obtained a mortgage decree for a large sum of money against one C. Unnikithiri. Certain members of the mortgagor's family, including his three children, who were minors, were made defendants. The minors were represented by their mother Radhalakshmi, the respondent in this appeal. The Bank of Calicut Limited, which is now in liquidation held a second mortgage on the properties of which one was the house in which the respondent and her children were living. At the sale held on the 4th January, 1943, in execution of the mortgage decree the Official Liquidator of the Calicut Bank, Limited (hereinafter referred to as the Official Liquidator) purchased the house for the sum of Rs. 52,000. The sale was confirmed on the 6th February, 1943.

Through their mother as their next friend the minors filed Original Suit No. 6 of 1943 in which they challenged the right of the mortgagees to sell the house and certain other properties. In the course of the proceedings they applied for an interim injunction against the Official Liquidator restraining him from taking possession of the house and from seeking confirmation of the sale. This application was dismissed by an order dated the 11th March, 1943. An appeal followed, but this was also dismissed.

On the 2nd March, 1943, the Official Liquidator filed an application asking for an order directing the delivery to him of possession of the house and his prayer was granted on the 11th March, 1943. Notwithstanding this order the Official Liquidator was obstructed by one Kalingal Kita who it is alleged was acting at the instigation of the respondent. This necessitated the Official Liquidator applying for an order against Kalingal Kita and the order was granted on the 30th March, 1943.

In 1942, a receiver was in possession of the house and on the 18th April, of that year he leased it to the respondent at a rent of Rs. 25 per month. On the 7th June, 1943, the respondent sent a notice to the receiver and the Official Liquidator

* A. A. O. No. 677 of 1943 and C. R. P. No. 1470 of 1943.

under sub-section (1) of section 7-A of the Madras House Rent Control Order, 1941. That section provided that if a tenant in possession wished to extend the period of his tenancy by not less than six, and not more than twelve months, he might give the landlord, not less than one month before the expiry of the tenancy, a written notice of his intention; and on the delivery of the notice, the tenancy should be deemed to have been extended for the period specified in the notice. The section also provided that the right of extending the tenancy conferred by this sub-clause might be exercised by the tenant as often as he thought fit. This order has been amended since but the amendments do not affect the question under discussion in this appeal.

Section 2 (3) of the Order defines the word "landlord" as including the person who is receiving or is entitled to receive the rent of a house whether on his own account or on behalf of himself and others or as an agent or trustee or who would so receive the rent or be entitled to receive the rent if the house were let to a tenant. The receiver was a landlord within the meaning of the Order and the respondent was entitled to avail herself of the provisions of section 7-A (1).

On the 16th June, 1943, the respondent filed an application in the Court of the Subordinate Judge under section 47 of the Code of Civil Procedure asking that the order for possession should be limited to symbolical possession and relied on the rights conferred upon her as a tenant by the House Rent Control Order, 1941. The Subordinate Judge held that her application was well-founded and consequently directed that only symbolical possession should be given to the Official Liquidator. The appeal is from that order.

We have no doubt that the order of the learned Subordinate Judge is right. The Madras House Rent Control Order conferred upon the respondent the right of having her tenancy continued provided she had given the requisite notice, which she had. She was in lawful possession of the house and the auction purchaser could only get possession of the property subject to her rights under the Order. We agree with the observation of the Subordinate Judge that where the extension of a tenancy is by operation of statute the Court is not concerned with the lack of merit in the tenant or of the hardship caused to the landlord.

The appeal must be dismissed with costs. The revision petition is also dismissed but without costs. The costs of the Liquidator will come out of the estate.

V.P.S.

Appeal and Revision Petition dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Zakka Pattabhirama Reddi

.. *Appellant**

v.

Menakur Balarami Reddi and others

.. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927)—"Trustee"—If includes person purporting to act as trustee in derogation of the rights of the de jure trustee—Such person how far "landholder" under Madras Estates Land Act (I of 1908) in respect of trust lands leased by him after his right to be trustee had ceased—Lessee if can assert occupancy rights under Madras Estates Land Act (1908), section 6 (as amended by the Third Amendment Act of 1936).

The definition of "trustee" in the Madras Hindu Religious Endowments Act cannot embrace persons who are purporting to act as trustees in fraud of the rights of the lawful trustees. They are wrong-doers and cannot be allowed to deal with the trust property in defiance of the rights of the true owners. Such a person cannot be deemed to be a "landholder" under the Madras Estates Land Act in respect of a lease of trust property made by him after the expiry of his right to be trustee and the lessee cannot as one being in possession as tenant under such a lease on 30th June, 1934, resist the claim for possession by the lawful trustee by asserting that he had obtained a permanent right of occupancy by reason of section 6 of the Madras Estates Land Act (I of 1908) as amended by the Madras Estates Land (Third Amendment) Act, 1936.

Appeal against the decree of the District Court of Nellore, in A. S. No. 72 of 1941, preferred against the decree of the Court of the Subordinate Judge of Nellore in O. S. No. 72 of 1938.

P. Chandra Reddi for Appellant.

The Advocate-General (*P. V. Rajamannar*) and *K. Subba Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In *Vedakannu Nadar v. Ranganatha Mudaliar*¹, a Bench of this Court held that a *de facto* trustee is in no better position than a trustee *de son tort* and cannot maintain an action on behalf of the trust, even should it be for the benefit of the trust. This opinion is said to be in conflict with the judgment of this Court in *Kasim Saiha v. Shudindra Thirthaswami*² and of the Calcutta High Court in *Sheo Shanker Gir v. Ram Shewak Chowdhuri*³. The appeal has been placed before a Full Bench, as Chandrasekhara Aiyar, J., before whom it came in the first instance, was of opinion that it involved consideration of these decisions. When the facts of the case are fully appreciated it is apparent that the appeal does not call for such a discussion.

The shrotriem village of Jonnavada in the Nellore district belongs to two deities, Sri Mallikarjunaswami and Sri Kamakshi Thai. At the Inam Settlement the ownership of the village by these deities was recognised. In original suit No. 52 of 1917 of the Court of the Subordinate Judge, Nellore, a scheme was settled for the management of the temple (which is a non-excepted temple) and of its endowments. Five trustees were appointed for a period of five years and the scheme provided that the Court should appoint new trustees every five years. The period of office of the trustees first appointed expired on the 1st May 1929. On the 3rd January, 1929, one of the three trustees who were then functioning induced the Subordinate Judge to pass this order :

"Under section 75 of Act (II of 1927) the scheme in force now is to be deemed as one settled under the Act and as it does not provide for appointment of trustees by the Temple Committee, section 51 (2) has no application. If the scheme requires modification so as to bring it into conformity with the provisions of the Act, the course to be adopted is that provided for under section 57 (4). Pending such modification the three trustees will have to carry on the management of the temple."

The Court had no power to give this direction, but even if it had, the powers purported to be conferred upon the three trustees expired on the 13th May, 1930, when the District Temple Committee appointed new trustees under the authority conferred by section 51 of the Madras Hindu Religious Endowments Act (Act II of 1927). The trustees who were appointed under the scheme had certainly no right to continue in management of the trust after the appointments which were made by the District Temple Committee on the 13th May, 1930, but they refused to hand over possession to the lawfully appointed trustees and continued to hold themselves out as the trustees of the temple. On the 8th August, 1935, the Madras Hindu Religious Endowments Board, as it had the power to do, appointed a new Board of trustees. The members consisted of the two plaintiffs and the second defendant in the suit which has given rise to this appeal. Even then the trustees appointed under the scheme refused to give possession of the trust properties to the trustees appointed by the Board, who were compelled to apply to the District Court under section 78 of the Act for an order for possession. The order asked for was granted and enforced.

On the 17th July, 1933, the trustees appointed under the scheme purported to grant to the first defendant a lease of the village of Jonnavada for a period of five years. At that time they were in unlawful possession of the property, as the District Temple Committee had exercised its powers under section 51 of the Act. When the plaintiffs were appointed trustees by the Board and had taken action under section 78, they sought possession of the property from the first defendant. He claimed that, as he was in possession of the property on the 30th June, 1934; he had obtained a permanent right of occupancy by reason of section 6 of the Madras Estates Land Act, 1908, as amended by the Madras Estates Land (Third Amendment) Act, 1936. The result was that the plaintiffs were compelled to file the present suit in the Court of the Subordinate Judge, Nellore. The lands, covered by the lease comprised 17.66 acres of wet lands, 61.63 acres of dry lands and 321.17 acres of pasture lands. The Subordinate Judge held that the first defendant had

1. (1938) 2 M.L.J. 663.

2. (1895) I.L.R. 18 Mad. 359.

3. (1896) I.L.R. 24 Cal. 77.

acquired a permanent right of occupancy in the wet and dry lands, but not in the pasture lands in respect of which he granted the plaintiffs a decree. The plaintiffs appealed to the District Judge, who held that the Subordinate Judge had erred in refusing them a decree in respect of the dry and wet lands. This appeal is from the decree passed in the appeal to the District Judge.

It will be seen that this is not a case where *de facto* trustees in the absence of *de jure* trustees take action with regard to the property of the trust in the interests of the trust, but where persons who have no manner of right to be in possession of trust property wrongfully keep the lawful trustees out of possession and purport to grant rights in the trust property to a third person. The learned advocate for the appellant, says that, although the lessors had no right to keep the *de jure* trustees out of possession, they were in fact acting as trustees and the definition of "trustee" given in section 9 (13) of the Madras Hindu Religious Endowments Act includes any person who is liable as if he were a trustee. Section 40 of that Act says that the trustee of a religious endowment is bound to administer its affairs and to apply the funds and properties of the endowment in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof; and as carefully as a man of ordinary prudence would deal with his own affairs, funds or properties. It is argued that the word "trustee" in this section must by reason of the definition be deemed to include *de facto* trustees.

Section 3 (5) of the Madras Estates Land Act defines "landholder" as meaning a person owning an estate or part thereof and as including a person entitled to collect the rents of the whole or any portion of the estate by virtue of a transfer from the owner or his predecessor in title or of an order of a competent Court or "of any provision of law." It is admitted on behalf of the appellant that the trustees appointed under the scheme could not, after the five years' period of office had expired, be deemed to be the owners of the estate but it is said that the words "or of any provision of law" attract the provisions of section 40 of the Madras Hindu Religious Endowments Act, read with the definition of "trustee" in that Act, and consequently the lessors must be deemed to come within the definition of "landholder" in the Madras Estates Land Act as persons entitled to collect the rent.

We regard this argument as entirely fallacious. The definition of "trustee" in the Madras Hindu Religious Endowments Act cannot embrace persons who are purporting to act as trustees in fraud of the rights of the lawful trustees. If the argument advanced on behalf of the appellant were to be accepted it would mean that *de jure* trustees could be defeated by persons who are in law mere trespassers.

In *Attakoya v. Kunhikoya*¹, the appellants, who were landholders within the definition of section 3 (9) of the Madras Local Boards Act, also came within the definition of "tenant." It was pointed out there that the definition of "landholder" is subject to there being nothing repugnant in the subject or context, and to treat the appellants both as "landholders" and "tenants," would not only be contrary to the scheme of the Act but would be impossible. It would certainly be contrary to the scheme of the Madras Hindu Religious Endowments Act and lead to an impossible position to hold that the persons by whom the first defendant was let into possession come within the definition of "trustee." They were wrong-doers and cannot be allowed to deal with the property in defiance of the rights of the true owners.

Accepting for the purposes of this case that a *de facto* trustee can alienate trust property when he acts *bona fide* and for the benefit of the trust and that the trustees appointed under the scheme were in 1933 entitled to the designation of *de facto* trustees the position of the first defendant would not be improved. It could not be in the interests of the trust for *de facto* trustees to grant a lease of a large block of trust property for such a long period as five years to one person, especially when there were proposals before the Legislative Council to alter the law relating to inam villages.

For the reasons given, this appeal is dismissed with costs.
K. S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Sundararaja Ayyangar

.. Appellant*

v.

Ramaswami Reddiar

.. Respondent.

Madras Agriculturists' Relief Act (IV of 1938), section 19-A enacted by amending Act (XV of 1943)—Scaling down on an application under the rules—Necessity to implead all parties as in a regular suit.

By reason of the new section 19-A enacted by the Amending Act (XV of 1943), proceedings for scaling down until then held under the rules must be deemed to be under the Act itself and it is necessary that all the parties who would be necessary parties in a suit, should be impleaded in those proceedings, seeing that there is now a right to get a decree on the basis of the declaration (in respect of a debt due under a mortgage, in the present case) on payment of the necessary court-fee. Though the rules did not require it, it is necessary in an appeal after the Amending Act to implead all those persons who would be necessary parties to a suit on the mortgage.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin, dated 12th July, 1943, in A. S. No. 143 of 1942, preferred against the order of the Court of the District Munsiff of Koilpatti in O. P. No. 56 of 1941 (dated 7th October, 1942).

A. C. Sampath Aiyangar for Appellant.

C. S. Rajappa and C. R. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of an order of remand passed at the hearing of an appeal from an order under the rules framed under the Madras Agriculturists' Relief Act (IV of 1938). The applicant to the trial Court was a member of the mortgagor family. The debt in respect of which a declaration is sought was a mortgage Ex. D-1 dated 22nd August, 1927, for a sum of Rs. 2,350 executed by all the members of the applicant's family in favour of one Gopala Ayyangar, the uncle of the present appellant. This mortgage discharged Ex. D-6, a mortgage for Rs. 800 dated 29th April, 1915, executed by the same parties in favour of the appellant's grandfather, who is also the father of Gopalaswami Ayyangar. Ex. D-6 itself discharged a still earlier mortgage of 1902 Ex. D-7 between the same parties for Rs. 500.

There are complications due to the subsequent history of the debt, Ex. D-1. In 1928 or thereabouts, there was a partition in the creditor's family. It is common ground that the mortgage debt though on the face of the documents the mortgagee was in each case a single member of the family, was really the property of the family. The only partition deed which has been put into Court is Ex. D-2, a registered document relating apparently only to the immovable properties of the creditor's family and reciting that there has been an earlier division of the movables by means of entries in the accounts. Subsequent to this partition, it is clear that the debtors dealt with the present appellant as the person to whom the mortgage debt had been allotted and there were two settlements one in 1934 and the other in 1936, whereby the parties agreed as to the amount then due which at the last settlement was Rs. 1,000. The lower appellate Court has, to my mind quite rightly, repelled the contention that each of these settlements created a fresh debt due from the debtors to the present appellant individually, in renewal of the previous debt due by them to the appellant's uncle or the joint family of which he was a member. Apart from all other difficulties in the way of this contention, it seems to me obvious that a mortgage can be created only by a registered instrument and these unregistered agreements between the parties as to the amount due, while they might estop the parties from denying the state of the accounts admitted in those settlements, cannot create any fresh mortgage in supersession of the original mortgage Ex. D-1. The debt to be scaled down therefore is the mortgage Ex. D-1 and it seems to me apparent that this is an instrument in favour of Gopala Ayyangar. Unless it can be shown that the mortgage has been transferred in some way known to law to the present

* A. A. O. No. 455 of 1943.

appellant, all that the appellant is entitled to is to receive the proceeds of the mortgage when it is realised. If he wishes to collect the debt, he must make the titular mortgagee a party.

There is a further complication due to the fact that there has been a partition in the respondent's family since the last settlement. It appears that there has been no allotment either of this mortgage debt or of the hypotheca to any individual member of the family. That being so, it would follow that all the members of the debtor family are jointly and severally liable under the mortgage and we are not concerned with any question as to the identity of the debtors, for there has been no renewal since Ex. D-1 was contracted. The explanation to section 8 of Act IV of 1938 only comes in, therefore, with reference to the relationship of the parties under Ex. D-1 to the parties under the antecedent transactions. It is common ground that the creditor under the two earlier documents was the appellant's grandfather, the then manager of the family, although he does not purport to act as manager. After his death the present mortgage Ex. D-1 was taken in favour of his son Gopala Ayyangar who was presumably the succeeding manager if not the heir of his father. There is no difficulty in holding that Ex. D-1 was in favour of the same creditor as the preceding documents and that the debtors were the same. The chain of renewals is therefore complete and it seems to me that it makes no difference if, during the currency of the present debt, there has been any devolution of the right to receive the proceeds by the partition in the creditor's family or any conveyance of the mortgage by any registered instrument executed at that partition. Nor does it make any difference if there has been a division in the debtor's family whereby all the mortgagors are liable as joint debtors, just as they were when the mortgage was executed.

The only matter which requires attention in the lower appellate Court's order arises from the passing of the Amending Act XV. of 1943. By reason of the new section 19-A enacted by the Amending Act, proceedings until then held under the rules must now be deemed to be under the Act itself and it is necessary that all parties who would be necessary parties in a suit, be impleaded in those proceedings, seeing that there is now a right to get a decree on the basis of the declaration on payment of the necessary court-fee. Seeing that this new Act will govern the present appeal, it becomes necessary to have such an adjudication as will satisfy the provisions of that Act and may eventually lead to a decree. For this purpose, it is now necessary, though the rules did not require it, to implead all those persons who would be necessary parties to a suit on the mortgage. If Gopala Ayyangar is still alive and if his title to the mortgage has not devolved upon the appellant by any registered instrument or on his heirs as a result of his death, he will obviously be a necessary party. It is also obviously necessary to implead the other mortgagors and any other persons interested in the hypotheca.

The order of remand will be modified so as to direct the trial Court to implead all those parties who would be necessary for the trial of a suit on the mortgage; and as a consequence of that amendment it is necessary to allow all parties to adduce fresh evidence. In other respects the appeal is dismissed and the respondent is entitled to his costs in this Court.

K. S.

Order modified.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—VISCOUNT SANKEY, LORD THANKERTON AND SIR MADHAVAN NAIR.

Batey Krishna

.. *Appellant**

v.

Parsotam Das and others

.. *Respondents.*

Limitation Act (IX of 1908); Article 132—Charge on account of subrogation—Declaration of a foreclosure decree in favour of subsequent mortgagee—Suit to enforce the charge—Starting point of limitation.

X, the owner of seven villages, mortgaged them to Y for Rs. 5,000 on 11th February, 1909, and the money became payable on 10th February, 1912. On 27th July, 1910, X sold an eight annas share in four of the seven villages to A the brother of B the plaintiff who by a partition in his family became the owner of a seven annas share in the said villages. On 12th March, 1915, X executed a mortgage of the remaining eight annas share of the four villages mentioned above and of the three entire villages in favour of the defendants. Y instituted a suit on his mortgage of 11th February 1909, and obtained on 24th July, 1915, a decree for sale in respect of the properties mortgaged to him. In order to save the properties from being sold in execution, the plaintiff paid Y on 19th June, 1917, the decretal sum of Rs. 6,151-13-0. On 22nd June, 1915, X had executed a mortgage of the above properties in favour of one G and the plaintiff redeemed this mortgage by paying Rs. 4,552 on 3rd April, 1917. On that day, X executed a further mortgage in favour of a benamidar of the plaintiff.

In a suit by the defendants as subsequent mortgagees for foreclosure, a charge was declared in favour of the plaintiff in respect of the two payments aforesaid made by him to the extent to which he had a priority over the defendants. In a suit by the plaintiff filed within twelve years of the decree but beyond twelve years of the payments by him,

Held, that the plaintiff by making the two payments (on 19th June, 1917 and 3rd April, 1917 respectively to discharge the earlier mortgages) had subrogated himself to the rights of the mortgagees whom he paid off, and the rights which he had thus obtained became merged in the decree in the foreclosure suit and in the circumstances the charge in favour of the plaintiff must be held to have been created by the final decree in the foreclosure suit and the suit to enforce that charge filed within twelve years of that decree was within time.

W. Wallach for Appellant.

C. S. Rewcastle, K.C. and *S. P. Khambatta* for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Allahabad dated 1st April, 1937, which affirmed a decree of the Court of the Subordinate Judge of Cawnpore dated 5th September, 1932, dismissing the plaintiff's suit. The plaintiff died during the pendency of the appeal in the High Court, and by an order of the Court, his son, the appellant before the Board, was brought on the record as the plaintiff-appellant in his place. The suit, out of which the appeal arises, was brought by the plaintiff to recover a sum of Rs. 45,765-6-3 as a charge against the properties specified in the plaint in the circumstances mentioned below. The sole question for decision is whether the suit is barred by limitation. The provision of the Limitation Act (IX of 1908) applicable, is Article 132, which prescribes a period of "twelve years" for a suit "to enforce payment of money charged upon immovable property," and time begins to run "when the money sued for becomes due." The facts necessary for the disposal of the appeal may be briefly stated:—The properties in the suit numbering seven villages, belonged to one Mt. Baktawar Begum. On 11th February, 1909, she mortgaged them for Rs. 5,000 to Syed Abid Husain. The money became payable by her on 10th February, 1912. On 27th July, 1910, she sold an eight annas share in four of the seven villages to Indar Prasad, the brother of the plaintiff, Jagmohan Das. By a partition of the joint family property of the plaintiff's family, the plaintiff became the owner of a seven annas share in the said villages.

On 12th March, 1915, Mt. Baktawar Begum executed a mortgage of the remaining eight annas share of the four villages mentioned above, and of the three entire villages in favour of Parsotam Das, defendant-respondent 1, and Jugal Kishore, the father of defendant-respondent 2. Syed Abid Husain instituted a suit on his mortgage of 11th February, 1909, and obtained on 24th July, 1915, a decree for sale in respect of the properties mortgaged to him. In order to save them from being sold in execution of the decree, the plaintiff paid Abid Husain on 19th June, 1917, the decretal sum of Rs. 6,151-13-0. On 22nd June, 1915, Mt. Baktawar Begum had executed a mortgage of the above properties in favour of Ganga Dhar and Gobardhan Das. The money under the bond became due on 21st June, 1918. The plaintiff redeemed this mortgage by paying the mortgagees Rs. 4,552 on 3rd April, 1917. On that date Mt. Baktawar executed a further mortgage in favour of one Girdharilal who was a benamidar for the plaintiff. The dispute between the parties to the suit now under appeal relates to the two sums paid by the plaintiff to Abid Husain, and Ganga Dhar, and Gobardhan Das, respectively. Jugal Kishore

and Parsotam Das (father of defendant 2, and defendant 1) as subsequent mortgagees instituted in the Court of the Subordinate Judge of Mohanlal gang, Lucknow, Suit No. 13/39 of 1927, for foreclosure on the basis of the mortgage dated 12th March, 1915, and three other deeds which had been executed by Mt. Baktawar Begum mortgaging the properties in the seven villages referred to above. Jagmohan Das, the plaintiff in the present suit and his brother Indar Prasad were defendants 3 and 4 in the said suit. Issue 3 in the suit was, "To what extent are defendants 3 and 4 entitled to priority against the deeds in suit?" The Subordinate Judge decided the suit in favour of the plaintiffs. The judgment concluded as follows:

"The foreclosure will be subject to a declaration of the following rights and charges of defendant 3 in respect of which he has a priority over the plaintiffs.

(A) .
(B) A charge of Rs. 6,151-13-0 or for such lesser amount if any as may be found due to defendant 3, in respect of the deed dated 3rd April, 1917.

(C) A charge of Rs. 4,552, or for such lesser amount if any as may be found due to defendant 3 in respect of the deed dated 3rd April, 1917.

Charges (B) and (C) operate in respect of 16 annas share in three villages, 8 annas share in four villages and one house, the entire property covered by plaintiffs' first three deeds. Charge (C) has priority in respect of the 2nd and 3rd deeds of the plaintiffs, but not in respect of the first deed."

A decree in accordance with the judgment of the Subordinate Judge was passed on 27th May, 1927. An appeal from the said decree was dismissed by the Chief Court of Oudh on 26th April, 1928. An appeal from the decree of the Chief Court was dismissed by the Privy Council on 20th April, 1931. Having obtained his rights judicially determined and safeguarded, the plaintiff, as already mentioned, instituted on 31st July, 1931, the suit out of which this appeal arises for the sums due to him which then amounted to Rs. 45,775-2-3 by the sale of the mortgaged properties, impleading as defendant 1, Parsotam Das (decree-holder 2 in the foreclosure suit), and defendant 2, Devandra Nath (the son of decree-holder 1). The other defendants were the heirs of Mt. Baktawar Begum who had died and the subsequent transferees of some of the mortgaged properties. In paragraph 12 of the plaint, the plaintiff stated that "the cause of action for the suit arose on 20th April, 1931, the date of the Privy Council decision." The contesting defendants (respondents) raised various defences of which the only one with which the Board is now concerned was that the suit is time-barred. On this question, with respect to which issue 3 in the suit "Is the suit barred by limitation" was framed, the Courts in India held that the 12 years' period of limitation prescribed by law for the enforcement of a charge expired before the suit was filed on 31st July, 1931, and that it is therefore barred by time. It is not necessary for the purposes of this appeal to examine the reasoning of the learned Judges as to when exactly the time began to run, whether from the time when the money became due under the mortgage bonds, or from the dates of payments made by the plaintiff, as in either case the period had expired; and further, the question in this particular form was not presented for their Lordships' consideration; nor does it arise in the view that they take of the ground on which their decision in this case should be based. The position taken up by the plaintiff in the plaint, that the cause of action for the recovery of the amount by enforcement of the charge accrued to him on the date on which their Lordships of the Privy Council delivered their judgment in the appeal, i.e., 20th April, 1931, was not maintained by him before the High Court, where it was contended on his behalf, relying on clause (2) of section 20, Limitation Act, that the suit is within time "because of certain payments alleged to have been appropriated by the defendants during their possession." Section 20, clause (2) Limitation Act, is as follows:

"Where mortgaged land is in possession of the mortgagee the receipts of rent or produce of such land shall be deemed to be payment for the purpose of sub-section (1),"—
which deals with "the effect of payment of interest as such or part payment of principal" before the expiration of the period of limitation. The learned Judges refused permission to the plaintiff to raise this ground as it was a new one raised for the first time in appeal, and required for its decision investigation of new facts. It may be stated that their Lordships have not been able to appreciate the signifi-

cance of this new point raised by the plaintiff-appellant, but it is not necessary for them to consider it or the question whether or not the High Court was right in refusing him permission to raise it as Mr. Wallach, his learned counsel, does not now press it before the Board, his sole argument being that a charge was created in favour of the plaintiff by the decree passed by the Subordinate Judge of Mohanlal-gang in suit No. 13/39 (the suit for foreclosure) on 27th May, 1927, and the present suit having been instituted on 31st July, 1931, is well within the 12 years' period of limitation. It was also contended before the High Court "that a charge had been created in favour of the plaintiff by virtue of the judgment passed by the learned Subordinate Judge of Lucknow," but the contention was rejected, the learned Judges stating amongst other things that the effect of the decision of the Subordinate Judge was merely that "he declared that the plaintiff has a right to recover the amount due by enforcing his claim in a separate suit." The short question for their Lordships to consider is whether the decree passed by the Subordinate Judge created a charge in favour of the plaintiff, for, if it created a charge, it is not disputed that the suit is in time. Mr. Rewcastle, the learned counsel for the respondents, has argued that the decree only declared a charge which had existed before, but did not create one. Their Lordships are unable to accept this argument. Attention has already been drawn to the concluding portion of the Subordinate Judge's judgment in the foreclosure suit. Incorporating this portion in it (*see* para 2), a preliminary decree for foreclosure in the usual form prescribed under Order 34, rule 2, Civil Procedure Code, was passed and it stated :

"if the decretal amount with costs is not paid within six months, *i.e.*, on or before 27th November, 1927, the one anna share will be sold and the defendants shall be debarred from all rights to redeem the property..."

This must have been followed subsequently by a final decree, though it has not been filed, for it is admitted that the respondents have been and are in possession of the properties. The plaintiff by making the two payments mentioned above had subrogated himself to the rights of the mortgagees whom he paid off, and the rights which he had thus obtained became merged in the decree passed by the Subordinate Judge in the foreclosure suit. In the circumstances, it is clear to their Lordships that the rights which the defendants have obtained can only be subject to the qualification of the rights of the plaintiff, *i.e.*, a charge in favour of the plaintiff must be held to have been created by the final decree in Suit No. 13/39 of 1927. That this should be the normal construction of the final decree is not denied, and their Lordships think rightly, by the learned counsel for the respondents. Viewed in this light, it is not disputed that the present suit to enforce the charge is within time. In the result their Lordships will humbly advise His Majesty that this appeal should be allowed and that the appellant should be given a decree as prayed for, with costs throughout.

Solicitors for Appellant : *T. L. Wilson & Co.*

Solicitors for Respondents : *Harold Shephard.*

K. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Ponnambala Chettiar

*Petitioner**

v.

Sriramulu Chettiar

Respondent.

Madras Debt Conciliation Act (XI of 1936), sections 4 and 25—Application under section 4—Stay of sale—Abolition of Board—Notification directing Board to adjourn cases sine die—Duty of Court to adjourn sale—Question whether debtor was an agriculturist—Whether material.

In execution of his decree the respondent sought to bring the property of the petitioner to sale and the sale was ordered. Two days before the sale was to take place the petitioner put in an application under section 4 of the Madras Debt Conciliation Act, and on the date of sale drew the attention of the executing Court to the fact that he had filed an application and asked the Court to stay the sale under section 25 of the Act. It was contended that as the Board was dissolved at a later date

the application should be taken to have been dismissed. It was also argued that the Board was not properly constituted at the time when the application was received because by a notification the Government had ordered that the applications should be adjourned *sine die*.

Held, that the dissolution of the Board did not amount to a dismissal of the application, that the notification did not affect the constitution of the Board, and that the executing Court was bound to stay the sale under section 25 of the Act.

Held further, that in such an application the question whether the petitioner was an agriculturist or not was a matter to be considered by the Board and that had nothing to do with the disposal of the application under section 25 of the Act.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Cuddalore, dated the 6th day of September, 1943, and made in E. A. No. 121 of 1943, in E. P. No. 104 of 1942 in S. C. No. 146 of 1940.

M. Panchapakesa Aiyar for Petitioner.

K. S. Champakesa Aiyangar and Srinivasan and Srinivasan for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the first defendant in S. C. No. 146 of 1940, on the file of the Subordinate Judge of Cuddalore. In execution of his decree, the respondent sought to bring the property of the petitioner to sale; and sale was ordered. Two days before the sale was due to take place, the petitioner put in an application under section 4 of the Madras Debt Conciliation Act; and on the date of sale, drew the attention of the executing Court to the fact that he had filed an application and asked the Court to stay the sale under section 25 of the Act. The lower Court dismissed his application on various grounds. *Prima facie* the Court is bound to stay the application under section 25 of the Act if a petition is pending before the Board under section 4. It was contended by Mr. K. S. Champakesa Ayyangar, the learned advocate for the respondent, that the petitioner is not an agriculturist. Section 25, however, makes no reference to agriculturists at all. It says that:

"When an application has been made to a Board under section 4 any suit or other proceedings shall not be proceeded with."

Whether the petitioner is an agriculturist or not is a matter to be considered by the Board; and there can be no doubt that a petition was pending before the Board.

It was next argued that the Board as and from 14th December, 1943, was dissolved; and that as there was no Board existing, the execution proceeding should not be stayed. Section 25 says that any proceeding before a civil Court shall not be proceeded with until the Board has dismissed the application; and the dissolution of the Board does not amount to a dismissal of the application. This question came up before Byers, J., in *Vithidunnissa Saheb v. Mahaboob Ali*¹. I respectfully agree with his conclusion that, in such circumstances, it cannot be said that the Board has dismissed the application.

The third argument is that by a notification of 8th May, 1943, the Government ordered the Board to take on file any applications that might be made, but ordered it to adjourn those applications *sine die*. It is therefore argued that the Board at the time when it entertained this application was not a properly constituted Board to which section 25 could apply. It is conceded that prior to 8th May, 1943, the Board was a properly constituted Board and that it continued as such up to the date of dissolution on 14th December, 1943. The direction of the Government on 8th May, 1943 was an executive one ordering the Board not to proceed with any new petitions but to adjourn them *sine die*. None of the powers of the Board were taken away on 8th May, 1943; and the fact that the Board was to adjourn the petition *sine die*, which power it had in any event, could not affect the constitution of the Board.

Section 17 of the Act says:

"If no amicable settlement is arrived at under sub-section (1) of section 14, within twelve months from the date of the application under section 4, the Board shall dismiss the application."

That does not, however, mean that after twelve months the application becomes automatically dismissed. It is a mandatory direction to the Board which it is bound to carry out; but the dismissal has to be made by the Board; and the dismissal is a judicial act.

The petition is therefore allowed and the lower Court ordered to stay the sale of the petitioner's lands until the petition before the Debt Conciliation Board has been dismissed. The petitioner is entitled to his costs in this Court and in the lower Court.

B.V.V.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Jonnakuti Annamma

.. *Petitioner**

v.

Kandavalli Kanakamma

.. *Respondent.*

Madras Village Courts Act (I of 1889), section 73—Scope—Suit in Panchayat Court—Finding that suit was not barred by limitation—Contrary finding by District Munsiff on petition under section 73 on the evidence—District Munsiff has no jurisdiction to interfere.

Under section 73 of the Village Courts Act the District Munsiff can interfere only on one of the grounds mentioned therein. He is not at liberty to re-consider the evidence as if he were a Court of Appeal and to interfere in revision because he comes to a conclusion on a question of fact (such as, a plea of limitation) different from that of the Panchayat Court.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Ellore in O. P. No. 3 of 1942.

B. V. Viswanatha Aiyar and D. Munikanniah, for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—A suit was brought in the Panchayat Court of Ellore for Rs. 50 agreed to be paid by the defendant in lieu of a *nagaram*. A question of limitation was raised which was considered by the Panchayat Court, which came to the conclusion on the evidence adduced that the suit was not barred by limitation. On a petition under section 73 of the Madras Village Courts Act, the learned District Munsiff discussed at some length in paragraph 5 of his judgment the evidence relating to the question of limitation and held that on the evidence the suit was barred by limitation. He then went on to say :

"I find that the Panchayat Court has exercised jurisdiction not vested by law and has acted illegally and with material irregularity and the decree is clearly unjust ;"

that is to say, he allowed the petition on all the grounds set out in the second and third classifications found in section 73. The Panchayat Court certainly did not act unjustly, illegally, or with material irregularity, or without jurisdiction, in considering the evidence on the question of limitation and coming to the conclusion that the suit was not barred by time.

Although verbally it is true, as the learned District Munsiff has said, that there is no definite finding in the judgment of the Panchayat Court that the suit was in time, it is quite clear that the Panchayat Court considered this matter and came to the conclusion that the suit was within time.

The District Munsiff can interfere under section 73 only on one of the grounds mentioned therein. He is not at liberty to reconsider the evidence as if he were a Court of Appeal and to interfere in revision because he comes to a conclusion on a question of fact different from that of the Panchayat Court.

The petition is allowed, the order of the lower Court set aside, and the decree of the Panchayat Court restored. The petitioner is entitled to her costs in this Court and in the lower Court.

V.P.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE WADSWORTH.

P. Ammaniamma

.. Appellant*

v.

Pattikonda Muddappa (died) and others

.. Respondents.

Civil Procedure Code (V of 1908), Order 21, rule 2 (3)—Prohibition against recognition of uncertified payments or adjustment—Applicability to cases of full as well as partial discharge of decree.

The prohibition (under Order 21, rule 2 (3) of the Civil Procedure Code) of the recognition of any uncertified payment or adjustment applies just as much to a total discharge as to a partial discharge of the decree.

Appeal against the order of the Court of the Subordinate Judge, Chittoor, dated 10th November, 1942 and made in E. P. No. 101 of 1941 in O. S. No. 35 of 1934.

S. V. Venugopalachari for Appellant.

B. C. Seshachala Aiyar for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal arises out of a decree on a promissory note executed by defendants 1, 3, 4, 5, and 6. The decree was passed on the 7th March, 1935, for a sum of Rs. 11,668-10-6 together with Rs. 1,292-11-0 as costs. There were ten defendants in all, the other defendants being the sons of the executants. During the years 1935 and 1936 sums totalling Rs. 3,250 were paid towards the decree and are credited in the present execution petition which was filed on the 9th August, 1941. The balance claimed amounting to Rs. 1,3682-9-6 was sought as against defendants 1 to 3 alone. The execution was resisted on the basis of a story of payment made to the fifth defendant who is alleged to have satisfied the decree, though no such satisfaction was recorded; and it is alleged that the decree-holder is now executing the decree at the instance of the fifth defendant. The main question is whether it is open to the appellant to put forward such a contention having regard to the terms of Order 21, rule 2 of the Code of Civil Procedure. Order 21, rule 2(3) states that "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree." In substance the appellant is seeking to put forward an uncertified adjustment of the decree. We have not been referred to any authority for the view to which the lower Court refers that the Court should inquire into the matter when the plea is that the decree has been completely discharged and there is no executable decree in existence. It seems to us apparent that the prohibition of the recognition of any uncertified payment or adjustment applies just as much to a total discharge as to a partial discharge. In this view we do not think it necessary to go into the evidence which the lower Court has taken, and we dismiss the appeal with costs.

K.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Ismail Abdulla Sait

.. Petitioner† (Accused).

Madras Prevention of Adulteration Act (III of 1918), section 12(2)—Charge of adulteration of coffee powder—Mixture of other goods proved—Acquittal of accused—Order for destruction of goods seized—Validity.

The petitioner was charged before the First Class Bench of Magistrates under section 5 (1) (b) of the Madras Prevention of Adulteration Act, 1918, read with rule 40 (b) of the rules framed thereunder, with having mixed fifty per cent. of mahua flower, coffee, husk and cereal with coffee prepared by him. It was said that on the label on the packets which were seized by the Health Officer appeared the words 'coffee powder fifty per cent. Indian chicory fifty per cent.' The petitioner was acquitted of the charge of selling adulterated coffee but the goods seized were ordered by the Magistrate to be

* A. A. O. No. 156 of 1943.

13th October, 1944.

† Cr. R. C. No. 333 of 1944.

23rd August, 1944.

(Cr. R. P. No. 317 of 1944).

destroyed under section 12 (2) of the Act. The Provincial Government did not prefer an appeal against the acquittal, and the only question raised was whether the order for the destruction of the goods was lawfully passed.

Held, that the goods seized were adulterated within the meaning of the Madras Prevention of Adulteration Act and the order for their destruction was a lawful one.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Cudappah division in C. A. No. 55 of 1943, preferred against the judgment of the Court of the First Class Bench of Magistrates, Cudappah in B. C. No. 65 of 1943.

V. Rajagopala Mudaliar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Order of the Court was made by

The Chief Justice.—The petitioner was charged before the First Class Bench of Magistrates, Cudappah, under section 5 (1) (b) of the Madras Prevention of Adulteration Act, 1918, read with rule 40 (b) of the rules framed thereunder with having mixed fifty per cent. of mahua flower, coffee husk and cereal with coffee prepared by him. It was said that on the label on the packets which were seized by the Health Officer appear the words: "Coffee powder 50 per cent., Indian Chicory 50 per cent." It was argued that mahua flowers are known as Indian Chicory. As pointed out by the Sessions Judge on appeal, even if this be so, we express no opinion on the point—there was still adulteration because of the admixture of coffee husk and cereal. The petitioner was convicted by the Magistrate of the charge of selling adulterated coffee and the goods seized were ordered to be destroyed under the provisions of section 12 (2) of the Act. The conviction was on appeal set aside by the Sessions Judge who however concurred in the order for the destruction of the goods. The Provincial Government has not preferred an appeal against the acquittal and the finding that the petitioner had not committed the offence of selling adulterated coffee must be accepted.

The only question which has been argued for the petitioner is whether the order for the destruction of the goods was lawfully passed. It was suggested by the learned advocate for the petitioner that as the rules under the Act do not deal with the destruction of goods seized there was no power in the Court to pass an order for destruction. The learned advocate has overlooked entirely the provisions of section 12 (2) of the Act, which says that whether or not a complaint is laid before a Magistrate of any offence under the Indian Penal Code, or under the Act, if it appears to the Magistrate on taking the evidence that an article is adulterated or other than what it purports or is represented to be, he may *inter alia* order the article to be destroyed. That the goods seized were adulterated within the meaning of the Act is quite clear and the order for the destruction is not only a lawful one but is a very proper one.

The petition is dismissed.

B.V.V.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Madrasai Bakiath Us-Salihath, Vellore, a Society managed by a governing body of 20 members by Messrs. P. Abdul Khader Sahib and others

*Appellants**

v.

T. K. Elumalai Chetti

Respondent.

Rules relating to Legal Practitioners' Fees—Rules 34 and 31 (1) and (2)—Costs decreed in suit—Petition to execute costs portion of relief—Fee allowable on execution petition one-fourth of the fee allowable on amount marked as costs.

Under rule 34 of the Rules relating to Legal Practitioners, the fee for practitioners appearing in execution petitions in small cause or original suits shall be one-fourth of the fee allowable on the amount or value of the relief granted by the decree as calculated under rule 31 irrespective of the number of such petitions.

Where there were two reliefs granted, one for giving possession to the plaintiff and another for payment of costs to him, the fee allowable on an application to execute the second relief will be only one-fourth of the fee permissible on the amount marked as costs.

Appeal under clause 15 of the Letters Patent from the judgment of Kuppuswami Ayyar, J., dated 30th September, 1943, and passed in A. A. O. No. 595 of 1943, preferred to the High Court against the order of the Court of the Subordinate Judge, Chingleput, dated 13th March, 1943, and made in E. A. No. 38 of 1943 in O. S. No. 160 of 1940.

T. E. Ramabhadrachariar for Appellant.

C. S. Swaminathan, for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—There is no substance in this appeal. The appellant obtained a decree declaring that he was the owner of certain immovable properties. These were in the possession of a receiver and on the decree being passed the receiver put him in possession. The decree also directed that the defendant should pay by way of costs the sum of Rs. 926-13-0. An application was filed for the execution of this part of the decree and it was contended by the appellant that he was entitled to have as the fee allowed to his pleader for the execution petition a sum of Rs. 212-8-0, being one-fourth of Rs. 850 which was the amount allowed for the pleader's fee in the suit. The Subordinate Judge held that under rule 34 he was only entitled to one-fourth of the fee allowable on Rs. 926-13-0. Under rule 31 (1) that fee was Rs. 46-8-0, and one-fourth came to Rs. 11-10-0. This decision was upheld by Kuppuswami Ayyar, J., and the appellant has now appealed under clause 15 of the Letters Patent.

Rule 34 of the Rules relating to the legal practitioners states that the fee for practitioners appearing in execution petitions in small cause or original suits shall be one-fourth of the fee allowable on the amount or value of the relief granted by the decree as calculated under rule 31 (i) and (ii), irrespective of the number of execution petitions. By the decree the plaintiff was granted two reliefs. The first was that the receiver who was in possession of the properties should put the plaintiff in possession. The second was that the first defendant should pay the plaintiff Rs. 926-13-0 for the costs of the suit and bear his own amounting to Rs. 155-12-0. The execution petition was filed to enforce this second relief, and under rule 34 the fee allowable was one-fourth of the fee allowable on Rs. 926-13-0.

The appeal is dismissed with costs.

K.C.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.
Moidin Bacha Rowther and another

.. *Appellants**

v.

I. S. Chidambaram Pillai

.. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 19—Trial Court's decree superseded in appeal—Application under section 19 wrongly made to trial Court—Fresh application to appellate Court—Limitation Act (IX of 1908), section 14—Applicability—Civil Procedure Code (V of 1908), Order 41, rule 14.

When the trial Court's decree has been superseded by an appellate decree passed after Madras Act IV of 1938 came into force, no application under section 19 will lie to the trial Court to scale down the trial Court's decree. And the fact that the debtor had no notice of the appeal is immaterial.

In such a case the mere fact that the judgment-debtors have erroneously prosecuted proceedings for scaling down the decree debt in the wrong Court, namely, the trial Court, is no ground for applying section 14 of the Limitation Act so as to enable them to move the appellate Court for scaling down the decree debt.

*A. A. O. No. 586 of 1943 and C. M. P. Nos. 3518, 3519, 3791 and 3792 of 1943.

When an appeal is filed and the only respondents to the appeal are persons who have allowed the proceedings in the trial Court to go on *ex parte* it is undesirable to apply the proviso to rule 14 of Order 41, of the Civil Procedure Code without an attempt to serve at least one of the respondents.

Appeal against the order of the Court of the Subordinate Judge, Tinnevely, dated 7th July, 1943, and made in I. A. No. 680 of 1942 in O. S. No. 59 of 1934, etc.

G. R. Jagadisan for T. E. Venkatarama Aiyar for Appellants.

B. Pocker and K. T. M. Ahmed Ibrahim for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellants, who are also the petitioners in the Civil Miscellaneous Petitions, were indebted to the respondent under a promissory note of 1928. The respondent filed a suit and in February, 1935, obtained an *ex parte* decree. He appealed against the decree seeking a charge in respect of the amount declared due. In that appeal the judgment-debtors were not served with notice although they were the sole respondents, the Court having apparently dispensed with the service of notice under the provisions of the proviso to Order 41, rule 14 of the Code of Civil Procedure read with Appellate Side Rules 12-A (17). In our opinion when an appeal is filed and the only respondents to that appeal are persons who have allowed the proceedings in the trial Court to go on *ex parte* it is undesirable to apply the proviso to rule 14 of Order 41, of the Civil Procedure Code without an attempt to serve at least one of those respondents. The appeal against the decree was, however, heard in the absence of the respondents thereto and it was dismissed; so that on the face of it, it would appear that the debtors suffered no harm by reason of the hearing of the appeal *ex parte*.

The matter was, however, complicated by the fact that the appeal resulted in a decree of the High Court dated 28th July, 1939, whereas Madras Act IV of 1938 giving a right to judgment debtors under section 19 to apply for the scaling down of a decree, came into force on the 22nd of March, 1938. The debtors took no action to secure the benefits of Act IV of 1938, until in 1942, the decree-holder sought to execute the High Court's decree. Thereupon, the debtors, instead of moving the High Court, started proceedings in the trial Court under section 19 of Act IV of 1938 to scale down the decree. The trial Judge held on 7th July, 1943, that in view of the passing of the High Court's decree after Act IV of 1938 came into force, he had no jurisdiction under section 19 to scale down the decree debt. Thereupon the debtors filed the present appeal, C. M. A. No. 586 of 1943 and on the 25th August, 1943, they also filed an application in this Court, C. M. P. No. 3519 of 1943, to rehear Appeal No. 199 of 1936 in order to give them an opportunity to urge in the rehearing of the appeal their claim to relief under Act IV of 1938. C. M. P. No. 3518 of 1943 has also been filed at the same time to excuse the delay in filing C. M. P. No. 3519 of 1943. By way of supplementing their application for the hearing of the appeal against the decree, they subsequently filed C. M. P. No. 3791 of 1943 which is a petition for scaling down the debt and C. M. P. No. 3792 of 1943 which is a petition for stay of proceedings.

It was held by this Bench in *Ramaswami Odayar v. Ramanathan Chettiar*¹, that section 19 of Madras Act IV of 1938 has no application to decrees passed after the Act came into force and that the same rule applied to decrees in appeal of which the affected party has had notice. Our recollection is that this observation regarding notice was inserted because we did not then wish to prejudge the case which might arise of an appeal dismissed under Order 41, rule 11, of the Civil Procedure Code without any opportunity being given to the debtors to appear and contest. There is a later judgment of one of us in *Palani Mudaliar v. Athiappa Goundan*², in which it was held that an application under section 19 to scale down the trial Court's decree passed before the commencement of Act IV could not be entertained when there was an appellate decree passed after Act IV came into force, even though the debtor seeking relief had no notice of the appeal. It seems to us now to be well settled that when the trial Court's decree has been superseded by an

1. (1941) 1 M.L.J. 6.

2. (1942) 2 M.L.J. 599.

appellate decree passed after Act IV came into force, no application under section 19 will lie to the trial Court to scale down the trial Court's decree. It follows that C. M. A. No. 586 of 1943 has to be dismissed with costs.

It remains to be considered whether the debtors can succeed in their application to rehear the appeal against the decree in the suit. Section 5 of the Limitation Act has not been made applicable to proceedings under rule 21 of Order 41 of the Civil Procedure Code. If, therefore, the applicants are to succeed they must succeed by virtue of section 14 of the Limitation Act. It is contended that as soon as the applicants knew of the appellate decree, they prosecuted a proceeding, which though it has now been found to be a wrong proceeding, was at any rate prosecuted in good faith in order to get the decree scaled down, and that when they apply now to have the appeal against the decree reheard, the relief which they seek is substantially the same relief namely to get the decree scaled down. This contention involves the reading of section 14 in a somewhat liberal way; for undoubtedly the relief sought in the application under section 19 is not precisely the same as the relief sought in the application to rehear the appeal. The only relief in terms stated in the latter application was the relief of the rehearing of the appeal, though doubtless the object with which the petitioners sought to get the appeal reheard was to obtain an opportunity to raise the same contentions as those which they had unsuccessfully raised in the abortive proceedings under section 19. Our attention has been drawn to a decision of King, J., in *Vaithilinga Naidu v. Narayanaswami Naidu*¹, wherein a very liberal construction of the phrase "the same relief" in section 14 has been adopted. But it does not appear that the attention of the learned Judge was drawn to the decision of the Privy Council in *Maqbal Ahmed v. Onkar Pratap Narain Singh*². In that case their Lordships had to deal with an application for a final decree in a mortgage suit in which the applicants sought under section 14 of the Limitation Act to take advantage of the time spent in an erroneous proceeding to execute the preliminary decree. Their Lordships observe:

"It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit."

That being so, it is not permissible, on the basis of section 14, in computing the period of limitation prescribed, to exclude that particular period."

Now it may well have been argued before their Lordships that substantially the relief sought in seeking to execute the preliminary decree was the same relief as that sought in applying for a final decree for sale, namely, the realisation of the amount due under the mortgage decree. Nevertheless their Lordships held that it was not possible to apply section 14 because the relief of final decree for sale was not the same as the relief sought by way of execution of the preliminary decree. It seems to us therefore in the light of the decision of their Lordships that we are unable to construe the words "the same relief" in section 14 in any liberal sense, so as to look not to the precise relief sought in the proceedings, but to the ultimate object with which that relief is sought.

In this view we must hold that the petitioners in C. M. P. Nos. 3518 and 3519 are not entitled to the benefit of section 14 in respect of the time spent in the abortive proceedings under section 19 of Act IV. C. M. P. No. 3518, 3791 and 3792 must therefore be dismissed with costs in C. M. P. No. 3518 of 1943.

B.V.V.

Appeal and petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE HORWILL.

The British India Steam Navigation Co., Ltd., by their local agents,

Messrs. Madura Co., Ltd., Negapatam

.. Appellant*

v.

Sandana Adaikalam and another

.. Respondents.

*Maritime Law—Loading of ship in harbour—How far part of maritime adventure—Boat engaged for loading goods—Unlawful detention after usual hours loading not being completed—Squall forcing the master of the ship.

1. (1943) 1 M.L.J. 323.
2 S. A. No. 1591 of 1943.

2. (1935) 68 M.L.J. 665.
24th August, 1944.

to cast off boat for safety of the ship—Loss of boat by sinking — Liability for—Principle of general average contribution—Not applicable—Liability in tort for conversion—Limitation Act (IX of 1908), Articles 48 and 49 and not Article 36, applicable.

The plaintiff was hired with his boat by the second defendant to carry iron bars to a ship (in harbour) belonging to the first defendant company for loading. As the loading was not completed by 5 p.m. (the time permitted by the harbour rules) the plaintiff was detained under threat that if he did not remain, he would not be given his wages. During the night owing to an extremely heavy squall the master of the ship found it necessary for the safety of the ship to cast off the boat of the plaintiff and others. The boats being still loaded with iron bars sank almost immediately. In a suit by the plaintiff claiming the value of his boat,

Held, that the doctrine of general average contribution does not apply to the case. That principle applies only to those particular classes of goods or things, which by mercantile practice have been subject to that principle. The principle is not applicable to boats or articles that were not a part of the ship or its cargo, or its freight. Moreover the loading of a ship in harbour by a person not interested in the ship or its cargo is not part of a maritime adventure.

However, the shipping company is liable in tort for the loss of the plaintiff's boat. The master of the ship and the second defendant had unlawfully detained the boat and were guilty of conversion. As bailee of the boat the master of the ship acted wrongfully in setting it adrift and causing it to perish while his duty lay in preserving it. Articles 48 and 49 and not Article 36 of the Limitation Act are applicable to the claim.

Appeal against the decree of the District Court, East Tanjore at Negapatam in A. S. No. 103 of 1942, preferred against the decree of the Court of the District Munsiff, Negapatam, in O. S. No. 269 of 1941.

G. Krishnaswami Aiyar instructed by *Messrs. King and Partridge* for Appellant.

T. V. Ramiah and *K. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who is the first respondent here, was hired with his boat by the second respondent to carry iron bars to the "S. S. Sorada" of the appellant's company. According to the rules of the harbour, the work of loading should cease at 5 p.m.; but the Courts below have found that the officers of the ship and the second respondent were very slow and negligent in the loading of these iron bars into the ship, with the result that the work was not completed at 5 p.m. It has been found further that the plaintiff was anxious to return to the shore at 5 p.m., but that he was detained under threat that if he did not remain, he would not be given his wages. During the night, at about 10-30 p.m., an extremely heavy squall arose; and the master of the ship found it necessary for the safety of the ship to cast off the boat of the plaintiff and others. They were then still loaded with iron bars and sank almost immediately. The plaintiff claimed the value of his boat. The first Court gave a decree against the second defendant (the second respondent) and dismissed the suit against the first defendant (the appellant) on the ground that the remedy against the shipping company was barred by limitation. In appeal, the learned District Judge was of opinion that the suit was not barred by limitation; but decreed the suit chiefly on another ground, *viz.*, that the doctrine of General Average Contribution would apply. The first defendant has appealed to this Court.

It seems to me that the lower appellate Court was wrong in applying the principle of General Average. Dealing with this question, Carver in his "Carriage by Sea" in section 361 says:

"In the adventures we have been considering, three classes of interests are usually concerned; *viz.*, the interests in the ship, with her stores, furniture and tackle; those in the cargo; and those in the freight which remains to be paid on the cargo. These interests are liable to their own peculiar risks of total or partial destruction, and also to risks which threaten them as a whole. The exigencies of marine enterprise at times require that to avert a danger which threatens the whole adventure, some particular interest or interests shall be intentionally sacrificed for the benefit of the remainder. Familiar examples are the throwing overboard of cargo, or the cutting away of masts, for safety in a storm. Where such a sacrifice has been made, the whole burden of the loss occasioned is not left on the interest upon which it has fallen. The loss is said to be a general average loss; and the contributions made to it by those benefited are general average contributions."

It would seem from the above passage that this principle can only be applied to damage to the ship or its tackle or to the cargo or to the freight; and the learned advocate for the plaintiff has not been able to quote any instance to me in which

the loss of any other thing not included within one of these three categories has been compensated for by contributions under the principle of "general average." The learned District Judge gives the following as his reason for applying the principle of General Average to this loss :

"For that purpose (*viz.*, the taking in of the cargo), he invited the boat to stay and discharge the load, tied it to the ship, and, in a very real sense, made the boat with its cargo part of the ship's economy."

It would almost seem as if the learned Judge used the vague word "economy", because he was not very clear how the principle could be applied to the boats of a third party, which were under the control—not of the Master of the ship as the ship and cargo were, but of a third party, a mere contractor to bring goods to the ship and unload them. Moreover, even the cargo is not always subject to general average, deck cargo, for example, being an exception. The principle of General Average only applies to those particular classes of goods or things, which by mercantile practice have been subject to that principle. No case has been cited to me in which that principle has been applied to boats or articles that were not a part of the ship, or its cargo, or its freight. Moreover, I do not consider that the loading of a ship in harbour by a person not interested in the ship or its cargo is part of a maritime adventure.

I have no doubt, however, that, on the finding of the Courts below, the appellant is liable in tort for the loss of the plaintiff's boat. Had the incident occurred during the day, when the plaintiff was at the side of the ship of his own volition, I might have found it difficult to hold that the cutting of the rope attaching the boat to the ship was a tortious act; but the lower Courts have found that the plaintiff's boat was there against the plaintiff's will. The Master of the ship and the second defendant had unlawfully detained the boat and refused to return it to its owner. That being so, the plaintiff was entitled to claim the boat back from the Master of the ship; and if the Master did not return it, he was guilty of conversion. As a bailee of the plaintiff's boat he certainly acted wrongfully in setting the boat adrift and causing it to perish, when his duty lay in preserving it.

There remains for consideration the question of limitation, which the first Court found against the plaintiff as far as his claim against the Shipping Company was concerned. It is argued on behalf of the appellant that the proper Article of the Limitation Act to apply is Article 36 which is "for compensation for any malfeasance, misfeasance, or non-feasance independent of contract and not herein specially provided for." It is therefore a residuary Article. There are however two Articles which deal specifically with a case of this kind. They are Articles 48 and 49. Article 48 is "for specific immovable property lost or acquired by theft, or dishonest misappropriation, or conversion, or for compensation for wrongfully taking or detaining the same." The appellant, as I have already held, was guilty of conversion and of wrongfully detaining the boat. Article 49 also seems to apply. That Article is "for other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same." There was in this case a wrongful detention.

It is argued by Mr. Krishnasami for the appellant that the plaintiff's claim was not for the return of the boat, but for its value. It would have been absurd for the plaintiff to have claimed the return of the boat when he knew it was lying at the bottom of the Indian Ocean. If he had asked, as he might have done, for the return of the boat or its value, there can be no doubt that Articles 48 and 49 would have applied; and the plaintiff's claim cannot be any weaker because he omitted the claim for the return of the boat, which he knew no longer existed.

The appeal is dismissed with the costs of the first respondent.

The second defendant has filed a memorandum of cross-objections. The findings of fact of the lower appellate Court show that the second defendant was a joint tort-feasor with the first defendant and is, therefore, liable with him for the damage which resulted from their joint wrongful act. The memorandum of objections is also dismissed with the costs of the first respondent.

K. S.

Appeal and memo. of objections dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD THANKERTON, LORD WRIGHT AND SIR MADHAVAN NAIR.
Rai Bahadur Madhoram Sand and others .. Appellants*

v.

Raja Bahadur Kirtya Nand Sinha and others .. Respondents.

Transfer of Property Act (IV of 1882), section 52—Mortgage executed in 1922 after a decree on an earlier mortgage and during the course of execution proceedings—Doctrine of lis pendens as laid down in section 52 before its 1929 amendment applies—Partial subrogation not allowed both under section 92 (4) as well as under pre-existing law.

A mortgage executed after a mortgage decree and during the course of execution proceedings is subject to *lis pendens*. Where such mortgage came into existence before the amendment of the Transfer of Property Act by Act XX of 1929 came into force the doctrine of *lis pendens* applicable to the case is that enacted in section 52 before it was amended.

Partial subrogation is now disallowed by paragraph 4 of section 92 of the Transfer of Property Act. A person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question and the same principle applied under the pre-existing law.

W. Wallach for Appellants.

Sir T. Strangman, K.C. and H. D. Cornish for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Patna dated 19th March, 1937, which affirmed granting additional relief to the plaintiffs (respondents before the Board) the decree dated 28th March, 1933, passed in their favour by the Subordinate Judge of Purnea. The appeal is by defendants 1st party. The plaintiffs-respondents claimed the suit property which consists of a 2 annas 8 pies share of a certain mahal bearing tauzi No. 1298 in the District of Purnea, as purchasers in execution of a mortgage decree. The facts are somewhat complicated, but are not in dispute and may be summarised as follows : The suit property was originally part of an estate known as the Srinagar Raj, and the lands in tauzi No. 1298 were originally in an estate which bore the No. 1273. The proprietors of the tauzi were three brothers, two of whom Kalikanand and Kamalanand, the sons of Rani Jagrama, held a two-third share of it jointly, while the third share was owned separately by their step-brother, Nityanand Singh. In 1894, the estate was partitioned by the Collector under the Bengal Estates Partition Act. This resulted in the estate being split up into two tauzis, one of a two-third share—the property of Kalikanand and Kamalanand, bearing the old tauzi No. 1273, and the other of a third share, the property of Nityanand bearing a new number tauzi No. 1298. Rani Jagrama was given a maintenance of Rs. 1,000 a month charged upon the entire property, the three brothers being bound to contribute equally to the payment of this allowance. Kalikanand and Kamalanand subsequently purchased the share of Nityanand. On 15th August, 1905, Kalikanand and Kamalanand executed a simple mortgage for Rs. 1,00,000 of certain of their properties including the 2 annas 8 pies share of the estate bearing tauzi No. 1298 (the suit property in favour of one Ramsuram Prasad). The mortgagors are now represented by their descendants, defendants 6 to 13, referred to in the pleadings as defendants 2nd party. They are respondents 12 to 19 before the Board. On 13th November, 1907, Kalikanand and Kamalanand executed in favour of the appellants a simple mortgage for Rs. 1,12,000 of their properties mentioned in the deed (Ex. A 2) which included tauzi No. 1273. It was described in the deed as follows :

Tauzi No. 1273.	Name of Taluka.	Pargana.	District.	Extent of share.
Sadr. Jama. Rs. A. P. 7,500 7 7	Tirakandah.	Tirakandah.	Purnea.	16 annas.

* P. C. Appeal No. 25 of 1938.

29th June, 1944.

The deed did not specify in the schedule tauzi No. 1298. One of the questions arising in the appeal is, whether this mortgage covered tauzi No. 1298. The Subordinate Judge held that it did, but the High Court held that it did not. The bearing of this question on the decision of the appeal will be explained later. On 29th April, 1910, Kalikanand and Kamalanand executed a mortgage of tauzi Nos. 1273 and 1298 and other properties in favour of the plaintiffs-respondents for over Rs. 6 lakhs. On 16th September, 1912, Ramsuram Prasad, the mortgagee under the bond of 1905 brought suit No. 546 of 1912 against the mortgagors impleading the plaintiffs-respondents as mortgagees under the abovementioned subsequent mortgage of 1910, but not impleading the appellants, the mortgagees, under the bond of 1907. He obtained a preliminary decree on 17th December, 1914, and a final decree on 17th August, 1915. On 26th September, 1921, Ramsuram filed his execution petition, E. P. No. 113 of 1921 and the properties were brought to sale on 23rd April, 1921 (*sic* 1923). At the said sale the suit property was purchased by the plaintiffs-respondents. When they attempted to take possession of it, they were resisted by the appellants, and then, the suit out of which this appeal arises, was brought by them for possession of the same and for mesne profits.

Their Lordships will presently refer to the claim of the appellants to resist the plaintiffs-respondents, but to appreciate it, it is necessary that they should mention certain other events. During the pendency of Suit No. 546 of 1912, on 30th October, 1912, and 20th June, 1915, Kalikanand Singh for himself and as karta of the joint family consisting of himself, his sons and nephews executed two further mortgages of properties including tauzi No. 1298 in favour of one Raja P. C. Lal Chowdhary for Rs. 7 lakhs and Rs. 1,30,000 respectively. On 7th December, 1916, he brought 2 suits for sale, Nos. 765 and 766 of 1916, on those two mortgages; preliminary decrees were passed on 23rd January, 1918, and final decrees on 8th April, 1919. In 1920 T. S. No. 1097 was filed by certain members of the mortgagors' family to set aside the decrees obtained by the Raja, and while it was pending he executed his decrees (Execution Cases Nos. 78/79 of 1921) and purchased the properties on 7th February, 1922, subject to the prior charges of the appellants on their mortgage of 1907, and subject also to the prior charge of the plaintiffs-respondents founded on their mortgage of 1910. It may be mentioned that some of the defendants filed objection cases, Nos. 26 to 29, to set aside the sales.

On 29th March, 1920, Rani Jagrama filed suit No. 225 for Rs. 1,61,194 for arrears of maintenance charged on the properties, joining as parties, her son Kalikanand and the representatives of Kamalanand (deceased), the present appellants, Raja P. C. Lal Chowdhary and the plaintiffs-respondents. As the defendants 2nd party (defendants 6 to 13) now respondents 12 to 19 are the representatives of Kalikanand and Kamalanand the mortgagors, it will be noticed that all the parties to the present suit were included amongst the defendants in Suit No. 225 of 1920 brought by the Rani. Thus, at the time when Raja P. C. Lal purchased the properties in execution of his decrees, there were pending the Rani's suit, T. S. No. 1907 (*sic* 1097) brought to set aside the mortgage decrees obtained by him; and also Misc. Cases Nos. 26 to 29 brought to set aside the sales which he had obtained in execution of his decree. In the circumstances, the Rani, Raja P. C. Lal, the appellants, and the mortgagors compromised their disputes. The compromise was entered into on 17th September, 1922, and was embodied in a decree passed on 5th October, 1923. The present plaintiffs-respondents who were also parties to the Rani's suit were not parties to the compromise. It is not explained why they were left out; however, not being parties to it, they will not be bound by its terms. At the time of the compromise it was found that a sum of Rs. 85,000 was due to the Rani for her maintenance. The terms of the compromise have been well summarised by the High Court as follows:

"Certain of the properties purchased by Raja P. C. Lal were released from all claims on behalf of the mortgagors and from all claims by Rani Jagrama. These are the items of property 47 in all contained in Schedule A of the compromise in the decree Ex. J (4). To discharge the balance of his claim under his mortgage, the properties set forth in Schedule D were conveyed to him by the mort-

gagors and Rani Jagrama also released those properties from any claim by her. He also received a handnote for Rs. 1,30,000 executed by the defendants first party on behalf of the defendants second party, and his decree was deemed to be satisfied and he released from his mortgage charge, in favour of the mortgagors, certain items of property including tauzis 1273 and 1298; the result being that he got Rs. 1,30,000 and a clear title to a considerable part of the property which he had purchased. The Rani released certain properties including tauzis 1273 and 1298 from her charge, in favour of the defendants first party and obtained a life tenure in respect of certain other properties and got 11 items set forth in Schedule B with an absolute title. Finally the defendants second party executed on 18th September, 1922, a usufructuary mortgage in respect of the properties released in their favour including the two tauzis in question in favour of the defendants first party for Rs. 5,00,000, a part of which was made up by the handnote for Rs. 1,30,000, which was in effect borrowed from the defendants first party and the balance by the amounts due to defendants first party from defendants second party on the mortgage bond of 1907 and certain handnotes and a hundi after adjustment. As to the Rani's suit, the amount of Rs. 89,000 due on this was reduced in proportion to the property which she had released in favour of Raja P. C. Lal and the defendants first party and a decree was passed against the mortgagors and the other defendants for sums aggregating about Rs. 60,000."

In pursuance of the above compromise, on 18th September, 1922, the mortgagors executed in favour of the appellants a usufructuary mortgage which included tauzi No. 1298 amongst other properties. In 1923, the plaintiffs-respondents sued the mortgagors on the mortgage bond of 1910, and obtained a preliminary decree on 18th September, 1926. The appellants took possession of the suit property on the strength of the usufructuary mortgage dated 18th September, 1922, as it included tauzi No. 1298 amongst other properties, and resisted the plaintiffs-respondents when they sought to take possession of it as purchasers in execution of the decree in suit No. 546 of 1912. The plaintiffs-respondents contended that the usufructuary mortgage could not affect their rights acquired during the pendency of suit No. 546 of 1912 to which the mortgagors were parties; in other words, that the doctrine of *lis pendens* affected the mortgage and that the appellants derived no rights under it as against them. Amongst other matters, it was contended by the appellants that the principle of *lis pendens* could not be invoked by the plaintiffs-respondents in the circumstances of the case, that the usufructuary mortgage of 1922 was executed to pay off the mortgage of 1907 which included the suit property and that their right to redeem it on the strength of that mortgage was not affected by the decree in suit No. 546 of 1912 as they had not been made parties to it as subsequent mortgagees. It was also their contention, that they were subrogated to the charge which Rani Jagrama had over the suit property under the partition decree of 1894 and in consequence, their rights had priority over the mortgage of 5th August, 1905. On the above contentions, the following questions arise for determination:

1. Is the usufructuary mortgage dated 18th September, 1922, affected by the doctrine of *lis pendens* as alleged by the plaintiffs-respondents?
2. Are the appellants entitled to redeem the suit property as holders of the mortgage of 1907?
3. Are the appellants entitled to any right of subrogation?

The Courts in India decided all these questions in favour of the plaintiffs-respondents. The Subordinate Judge gave them a decree for possession of the property and for mesne profits from date of suit till recovery of possession; but he gave them no decree for mesne profits anterior to the institution of the suit. The appellants appealed from the decree, and the plaintiffs-respondents filed a memorandum of cross-objections. The High Court dismissed the appeal and allowed the memorandum of objections. Their Lordships will now consider the questions in order:

It appears to their Lordships that the plea of *lis pendens* is well founded. The usufructuary mortgage in question was executed by the mortgagors who were parties to suit No. 546 of 1912 before it ended on 23rd April by the purchase of the suit property by the plaintiffs-respondents. It cannot therefore affect their rights; on the other hand, the mortgage bond is affected by the doctrine of *lis pendens*. The doctrine applicable to the case is that enacted in section 52, Transfer of Property Act (Act IV of 1882) before it was amended by Act XX of 1929, as the mortgage came into existence before the amendment came into force. The section

limits the applicability of the doctrine so far as concerns the present appeal to purchases made during the "active prosecution" in any court of a "contentious suit or proceeding." It was argued by Mr. Wallach that in this case it could not be said that there was a "contentious suit," nor could it be said that there was an "active prosecution" of the same. It is to the credit of the learned counsel that he did not appear to their Lordships to overstress the point as the proceedings in the case amply show that the suit was contentious, that it was kept alive and that the proceedings in execution were carried on actively as may be judged from the various entries in the "order sheet." A mortgage executed after a mortgage decree and during the course of execution proceedings is undoubtedly subject to *lis pendens*. No useful purpose will be served by discussing the words referred to by Mr. Wallach as the section has now been amended by substituting the word "pendency" for the words "active prosecution"; and the words "any suit or proceeding which is not collusive" for the words "a contentious suit or proceeding."

The next question relates to the right of the appellants to redeem the mortgage of 1907. The learned counsel argued that the effect of the usufructuary mortgage was merely that they were enabled to enforce their mortgage of 1907 without recourse to a suit and that their possession under the usufructuary mortgage was no more than possession under their earlier mortgage which was prior to the rights acquired by the plaintiffs-respondents under their purchase, and that they were not affected by the decree in suit No. 546 of 1912. It is clear that this plea cannot avail them unless their mortgage of 1907 covered tauzi No. 1298 on which point the High Court as already mentioned, differing from the Subordinate Judge, has found against them. The Subordinate Judge based his conclusion that tauzi No. 1298 is included in tauzi No. 1273 mentioned in the deed of 1907 mainly on the "sadr-jama" (revenue) of that tauzi given in the deed. It is not disputed that tauzi No. 1298 is not specifically mentioned in it. His reasoning may be given in his own words:

"But the revenues of that tauzi and tauzi No. 1298 appearing from the D. Registers (Exs. L and L1) to be Rs. 4,827-8-1 and Rs. 2,413-12-0 respectively, their total comes up to Rs. 7,241-4-1 which approaches the revenue of Rs. 7,050-7-7 mentioned in the bond [Ex. A (2)] more nearly than the revenue of tauzi No. 1273 alone."

This reasoning was not accepted by the High Court for the reasons, that the number of the tauzi is 1273 which is specific, that the sadr-jama mentioned in the document itself Rs. 7,500, does not correspond with the actual aggregate sadr-jama of tauzis Nos. 1273 and 1298 which is admitted to be Rs. 7,241 and what is more important, that the amount of the jama cannot be held to indicate the property from which it is collected as it is conceivable that it might vary from time to time, whereas the property recorded under a particular tauzi number cannot vary. With this reasoning of the High Court their Lordships desire to express their entire agreement. If the tauzi No. 1298 is not included in the deed of 1907, then, no further question of the appellants' right to redeem the suit property based on that mortgage can arise. The last point raised relates to the right of subrogation claimed by the appellants. It will be remembered that the Rani had a charge over tauzi No. 1298 and various other properties of the Raj under the partition decree of 1894. Their Lordships understand the appellants' contention to be that as at the time of the compromise they advanced Rs. 1,30,000, and as a result of that advance the Rani released the charge which she had over tauzi No. 1298 and other properties; they are entitled to be subrogated to the rights of the Rani over the suit property. This contention was disallowed by the High Court on the ground that partial subrogation is not permissible in law. The reasoning of the learned Judges with which their Lordships agree is that it is impossible by analysing the terms of the compromise to find out what, if any, proportion of the advance of Rs. 1,30,000 is to be attributed to the release by the Rani of tauzi No. 1298. They also added that:

"The Rs. 1,30,000 advanced by the appellants to the mortgagors was really to pay off Raja P. C. Lal and the consideration for this loan was the usufructuary mortgage of 1922. In any event on the almost impossible supposition that the defendants first party are to be subrogated to Rani Jagrama's right, Rani Jagrama had merely a right to put the property charged to sale and could not claim a right to possession; so that the defendants first party cannot claim a right to possession as against the plaintiffs."

These observations are not without force. Partial subrogation is now disallowed by para. 4 of section 92, Transfer of Property Act. This section is new and was inserted by the amending Act XX of 1929. After explaining the nature of "subrogation" in para. 3, para. 4 of the section states that :

"Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

In *Janaki Nath v. Pramatha Nath*¹, their Lordships approving the dictum of Mookerjee, J., in *Gurdeo Singh v. Chandrikah Singh*² that :

"a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question,"
and

"that payment of a portion only of the incumbrance is not sufficient,"
observed that :

"such a qualification of the right of subrogation applies whether the right is claimed under the statute or the pre-existing law."

The usufructuary mortgage in the present case which is of the year 1922 is covered by this decision. As the appellants have not been able to establish their claim to the suit property on any of the grounds urged by them the appeal fails and should be dismissed with the costs of the plaintiffs-respondents. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants : *Hy. S. L. Polak & Co.*

Solicitors for Respondents : *Douglas Grant & Dold.*

K.S.

Appeal dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD THANKERTON, LORD WRIGHT AND SIR MADHAVAN NAIR.

N. R. Kapur

*Appellant**

v.

Murli Dhar Kapur and another

Respondents.

Privy Council—Appeal—Questions as to inclusion or exclusion of items in making up partnership accounts on dissolution—Question one of fact and not proper subject-matter of appeal.

Where the only questions raised in appeal were concerned with items of accounting in the taking of a partnership account on the dissolution of a partnership and there was no question of principle involved there was no proper subject-matter for an appeal to His Majesty in Council.

C. S. Rewcastle, K.C. and W. Wallach for Appellant.

Sir T. Strangman, K.C. and S. P. Khambatta for Respondents.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—Their Lordships are of opinion that this appeal should not be allowed to proceed as not presenting, apart from one possible point which will be mentioned in a moment, proper subject-matter for an appeal to His Majesty in Council. In the first place, the point upon which a different argument might be suggested, is the point with reference to the outstandings, which is contained in reasons 2 and 3 of the appellant's case. In their Lordships' opinion the matter was rightly decided by the High Court, and there is no substance in the argument suggested to the contrary. It is a question of construction of the partnership deed, and the phraseology of Article 10 of the partnership deed, in their Lordships' opinion, does not present any such difficulty as would admit a contrary view to the view expressed by the High Court. The remaining three reasons upon which Mr. Rewcastle addressed their Lordships, were reasons 7, 8 and 9. In the opinion of their Lordships, all three are concerned with ordinary items of accounting in the taking of a partnership account and would fall under the principle laid down in the judgment delivered by Lord Romer in the case of *Lala Hakim Rai*, on 22nd June, 1942,³ which is referred to in the practice note in 69 I.A. 172 :

1. (1940) 1 M.L.J. 46 : L.R. 67 I.A. 82 :
I.L.R. (1940) 1 Cal. 291 (P.C.).

2. (1907) I.L.R. 36 Cal. 193.

³ Reported in (1943) 1 M.L.J. 16 : I.L.R.
(1942) Kar. 157 (P.C.).

* P. C. A. No. 12 of 1943.

In the present appeal, their Lordships are unable to find, apart from the reason already dealt with, any question of principle whatever, and the items concerned in these three reasons are just ordinary items, questions as to the inclusion or exclusion of which are raised, in making up a partnership account on the dissolution of a partnership. The first reason—reason 7—relates to four payments, made to members of the family of one of the partners which were disallowed by the Subordinate Judge and were allowed by the High Court. This seems to be a pure question of fact and Mr. Rewcastle was prepared to admit that these were original liabilities of the firm; in any event, the Subordinate Judge's finding is very much vitiated by the fact that he has ignored the accounts of the firm, which was still running, in 1933, in which these are acknowledged as liabilities of the firm. That leaves the question whether in fact they had been discharged and if discharged by whom they had been discharged. There is no trace of any claim being made by the original creditors on the ground that the debts are alive. In any event, that seems to be a pure question of fact and they are just the kind of items in an accounting, such as are covered by the decision of this Board in 1942.

The next reason is reason 8. That is the liability of one of the partners, other than the appellant, to account for a sum which admittedly he has collected from the debtors, the firm of Aux Elegantes. The amount is alleged to be Rs. 2,400 which would benefit the particular appellant to the extent of Rs. 800. It is just a typical item in accounting, *viz.*, the liability of a partner to account to the firm, and in their Lordships' opinion is clearly covered by that previous decision. That leaves reason 9, which came to very little, because Mr. Rewcastle agreed that sufficient provision is made in the judgment of the High Court on page 205, at line 20, for his taking credit for this debt in reduction of any sum, execution for which is sought to be enforced against him. In fact, under the decree of the High Court, he had a decree pronounced against him for a sum of Rs. 22,000, so that there is ample from which to deduct the amount of this debt. It is clear that if, rather than have execution against him, he is ready to pay up under the decree, he would be entitled to have credit for this amount. Therefore there seems to be nothing in that point at all. For these reasons, their Lordships think that these questions are of the type which should not be entertained by their Lordships by way of appeal. Accordingly their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondents: *Barrow, Rogers & Nevill.*

K.S.

Appeal dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD PORTER, LORD GODDARD AND SIR MADHAVAN NAIR.

Pandit Shambhu Nath Shivpuri

*Appellant**

v.

Pandit Pushkar Nath and others

Respondents.

Trusts Act (II of 1882), Section 84—Assets held by a Hindu in the names of himself and his wife or relative—Presumption of intended advancement—Not applicable—Resulting trust in his favour.

The deposit by a Hindu of moneys in a bank in the joint names of himself and his wife and on terms that it is payable to either or survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife. The rule is not confined to assets in the joint names of the deceased man and his wife and is of universal application whatever the property and whatever the relationship.

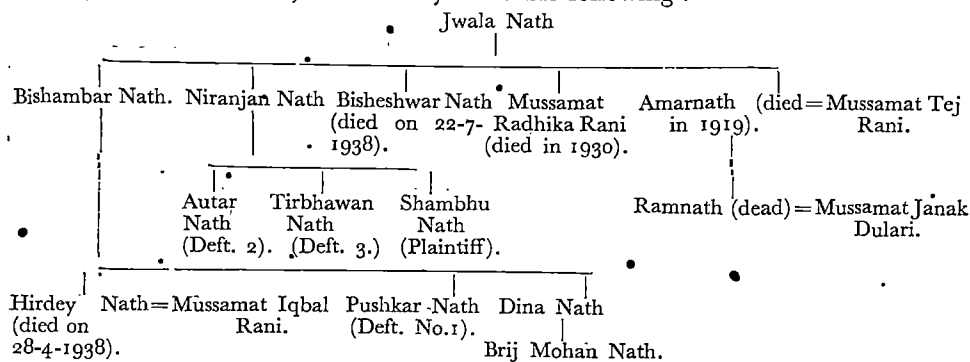
Charles Bagram for Appellant.

Robert Rilson for Respondents.

Their Lordships' judgment was delivered by

LORD PORTER.—This is an appeal from a decree of the High Court at Lahore dated the 15th May, 1942, which modified in favour of the first respondent a decree

of the Subordinate Judge of Delhi. The suit was initiated for the partition of the estate of Pandit Basheshwar Nath Shivpuri who had recently died. The appellant is one of his nephews. There were four defendants, and the relationship of the parties, one to the other, is shown by the table following :—



The fourth defendant, Pran Kishori, was a niece (the daughter of the deceased man's wife's sister).

Among the assets left by the deceased were the following : (1) Fixed deposit receipt of the Central Bank of India, Limited, for Rs. 48,500, in the joint names of the deceased and the first defendant.

(2) Ditto for Rs. 7,000 in the joint names of the deceased and the second defendant.

(3) Five postal cash certificates of Rs. 1,000 each in the joint names of the deceased and the second defendant.

(4) Four ditto, in the joint names of the deceased and one Hirdey Nath, elder brother of the first defendant, then deceased.

(5) Hundred shares in the Central Bank of India, Limited, value Rs. 3,130-4-0 in the joint names of the deceased and the first defendant.

(6) Fixed deposit receipt of the Punjab National Bank, Limited, for Rs. 4,000 in the joint names of the deceased and the fourth defendant.

(7) Rs. 279-10-6 in the Home Savings Safe Account of the Central Bank of India, Limited, in the joint names of the deceased and the first defendant.

(8) Rs. 450 in cash (spent on funeral expenses).

(9) A pucca house No. 1550—Ward No. 9 in Delhi.

As appears from this list, certain of the assets were held in joint names and the question which their Lordships have to determine is whether the learned Subordinate Judge was right in saying that these assets were nevertheless the absolute property of the deceased man at the time of his death or whether his object was that they should be so held for the advancement of those whose names were joined with his in the several instances.

The first Court held that all the joint holdings stood in the names of the parties to the suit as nominees except that in the name of the fourth defendant Pran Kishori. The High Court agreed in the last result but held that all the joint holdings like hers were for the advancement of those whose names were joined with that of the deceased and should be excluded from the partition.

The law in India in this matter is not in doubt and is authoritatively stated by their Lordships in *Guran Ditta v. Ram Ditta*¹ in the words :

“ the deposit by a Hindu of his money in a bank in the joint names of himself and his wife and on terms that it is payable to either or survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife.”

The rule, however, is not confined to assets in the joint names of the deceased man and his wife. It is conceded that it is of universal application whatever the property and whatever the relationship.

It was common ground therefore before their Lordships that it was for the first respondent to establish a contrary intention. If he succeeded in doing so he kept the assets standing in the joint names of the deceased and himself. If not those assets must be included in the partible property.

* * * * *

[Then their Lordships dealt with the evidence of intention to the contrary and observed:]

Like the High Court they think the evidence and the circumstances point to an intention on the part of the deceased man to advance to the joint holders and will therefore humbly advise His Majesty to dismiss the appeal.

The appellant must pay the first defendant's (respondent's) costs.

K.S.

Appeal dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD PORTER, LORD GODDARD AND SIR MADHAVAN NAIR.

Tungabai Bhratar Purushottam Shamji Kumbhojkav

*Appellant**

v.

Yeshwant Dinkar Jog and another

Respondents.

Contract Act (IX of 1872), section 16—Undue influence—Wife executing mortgage for husband's debt—Presumption of execution under influence of husband—When justifiable—Mortgagee with knowledge of circumstances cannot enforce the mortgage.

Where a mortgage of stridhanam property is executed by a wife as security for the debts of her husband who was already heavily involved and the circumstances showed that the wife knew nothing of the nature of the transaction and simply did as she was told by her husband (who had always managed her property) and signed whatever document she was told to execute, a presumption that she was acting under the influence of her husband is justified. It is not necessary in order to establish the presumption that the parties should stand in some particular category of relationship to each other. The presumption will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred. When a third party like the mortgagee who benefits by the transaction has notice of the facts which raise the presumption he is in no better position than the person who exercises the influence. Accordingly the mortgage is not enforceable against the wife.

C. S. Rewcastle, K.C. and R. Parikh for Appellant.

Their Lordships' Judgment was delivered by

LORD GODDARD.—The question that arises in this appeal is whether a mortgage deed executed by the appellant on 17th May, 1926, whereby she mortgaged to Dinkar Krishna Jog, deceased (hereafter called the plaintiff) now represented by the first respondent, all her landed property which had been left to her by way of "stridhan" to secure a loan of Rs. 7,000 is binding upon her. The Subordinate Judge at Belgaum held that it was not, and his decision on this point was reversed by the High Court of Bombay.

The plaintiff was a money-lender doing an extensive business and had made loans to the appellant's husband. The latter at the time of this mortgage was heavily in debt; he had mortgaged all his own property and, being pressed for money had nothing to offer by way of security for a further loan other than his already encumbered estate. He approached the plaintiff for a further loan of Rs. 7,000 but the latter was unwilling to lend it either on the security of the husband's encumbered lands or on a promissory note. So the only security which could be offered was the wife's land. The appellant was married to her husband some years ago at the age of 12, and is described by the Subordinate Judge as young in years and not very intelligent. She is quite illiterate, unable to read or write, but can sign her name. She has two children living and her stridhan property which brings in some Rs. 400 to 500 a year, is all that the family can depend on. Her husband managed the property entirely; she is evidently a submissive

wife, and if her husband told her to execute a document she did so at his bidding and without informing herself of the contents. The plaintiff, who was an educated and keen businessman admitted that he told the husband that he must have some letters from the appellant about the transaction, and accordingly four postcards were prepared and written by the husband to which the wife put her signature without knowing what was in them, and it would seem to be obvious that the plaintiff wanted them to strengthen his position should the transaction on which he was about to embark with the husband be called in question. He never saw her during the negotiations that he had with her husband and according to him the only time he did see her was on the evening before the mortgage was executed, when he said he was in a hurry and that the business, of which it may be said she knew nothing, must be finished the next day. On 17th May, in the morning, the husband told the appellant to come with him to Chikodi. He told her that a lease was to be registered. They went to the house of one Raghavendra, who afterwards witnessed the mortgage, and here it was prepared, though not in the wife's presence. The plaintiff did not appear in the document as the mortgagee; it was taken in the name of one Damodar as benamidar or nominee for him. Then when the parties went before the Sub-Registrar the money was produced and passed over by some one whom the plaintiff sent for that purpose. Whether the appellant actually handled the money is in dispute, but it is really immaterial. She never got the Rs. 7,000; some of it was passed back to the plaintiff in discharge of the husband's outstanding debt, some to another creditor, and what balance there was the husband took.

The Subordinate Judge who heard and saw the witnesses was satisfied that the appellant knew nothing of the nature of the transaction and simply did as she was told by her husband. He had always managed her property and she had passively acquiesced in what he did and signed whatever documents she was told to execute. On these facts the Subordinate Judge was satisfied that the appellant was throughout acting under the influence of her husband and without knowledge of the nature of the transaction. In the opinion of their Lordships it is unnecessary to enter into a discussion as to the burden of proof in such a case as this as the evidence here abundantly justifies a presumption that she was acting under the influence of her husband for whose benefit the mortgage was being executed. The matter was elaborately discussed before this Board in *Inche Noriah v. Shaik Alie Bin Omar*,¹ and before the Court of Appeal in *Lancashire Loans Ltd. v. Black*,² The first of these cases related to a gift by an aunt, who was a feeble old woman, to a nephew who managed her property. The second was a case of a daughter who shortly after her marriage stood surety for her mother in an important money-lending transaction. In both cases it was held on a review of the evidence given that a presumption of influence was raised. In the former case Lord Hailsham in delivering the opinion of the Board approved the judgment of Cotton, L.J., in *Alcard v. Skinner*³, where he divided the cases relating to influence into two categories; first where the Court is satisfied that the gift was the result of influence expressly used by the donee for the purpose, and secondly where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence on the donor.

It would certainly not be true to say that there is a presumption in every case where a wife confers a benefit on her husband without consideration. Equally it is not necessary in order to establish the presumption that the parties should stand in some particular category of relationship to each other. The presumption no doubt can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client, or spiritual adviser and penitent, but it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred. This in the opinion of their Lordships was the foundation of the decision of the Board in *Bank of Montreal v. Stuart*⁴. In that case a wife who was a confirmed invalid and who was found on

1. (1929) A.C. 127.

2. (1934) 1 K.B. 380.

3. (1887) 36 Ch. D. 145 (171).

4. (1911) A.C. 120.

the evidence to have no will of her own entered into an important transaction for the benefit of her husband. When giving evidence she appears to have somewhat indignantly denied that she was influenced by any pressure or that she acted otherwise than of her own free will to relieve her husband in distress. The Board was of opinion that this evidence only showed how deeprooted and lasting the influence of the husband was. There was ample evidence to justify the finding of the learned Subordinate Judge in the present case and their Lordships agree with his finding on this matter. Their Lordships are also of opinion that when a third party who benefits by a transaction has notice of the facts which raise the presumption he is in no better position than the person who exercises the influence. This was expressly decided in *Lancashire Loans Ltd. v. Black*¹, and by the High Court of Bengal in *Badia-tanessa Bibi v. Ambika Charan Ghosh*², and their Lordships agree with those decisions. Their Lordships entirely agree with the findings of the Subordinate Judge as to the plaintiff's knowledge and conduct and need not repeat his findings.

The High Court however in this case took a different view to that of the learned Subordinate Judge. It appears to their Lordships that the learned judges directed their minds much more to the question of whether it had been proved that the plaintiff had been a party to a fraud committed by the husband than to what in their opinion is the true question in the case. It is unnecessary to decide whether there was actual fraud by the husband; it is enough to show that the wife was acting under his influence and not as a free agent. Nor can they agree with the criticisms of the High Court on the Subordinate Judge's findings as to the transaction being one into which a right-minded person would enter and as to its improvidence. It seems to have been assumed by the High Court that the husband required a loan to enable him to do business with some salt pans that he had taken from the Government. The evidence does not in fact anywhere support this suggestion; it seems much more probable that he required the money to stave off pressing demands. Considering that he was at the end of his resources and that the income from the wife's property was all there was to support the family it was a most improvident thing to mortgage their only means of livelihood for the purpose of using at any rate a substantial portion of the money to pay off antecedent debts of the husband, and an action which no right minded person ought to have entertained. Accordingly their Lordships will humbly advise His Majesty that the appeal should be allowed; that so much of the decree of the High Court as varied the decree of the Subordinate Judge and decreeing the plaintiff's suit as against defendant No. 1 and ordering her to pay the plaintiff the decretal amount with costs and interest be set aside and the decree of the Subordinate Judge on this matter be restored. The appellants should have her costs in the High Court, and such costs of this appeal as she is entitled to having regard to the fact that she has been given leave to appeal in *forma pauperis*.

K.S.

Appeal allowed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD PORTER, LORD GODDARD AND SIR MADHAVAN NAIR.

Venkataramana Ayyar and another

.. Appellants*

v.

Natesa Pillai and others

.. Respondents.

Civil Procedure Code (V of 1908), Order 21, rules 90 and 69—Sale from day to day till appointed closing date—Agreement between parties to have sale continued for a week after such closing date—Order of executing Court continuing sale made after the closing date originally fixed—Sale held on the agreed closing date, neither illegal nor irregular.

An execution sale fixed for the 8th of July, was under orders of the Court from time to time directed to be continued from day to day till the 5th August. In the meanwhile the application

1. (1934) 1 K.B. 380.

of the High Court at Madras reported in (1940) 1 M.L.J. 568.

2. (1914) 18 C.W.N. 1133.

* P. C. A. No. 30 of 1942 from the decision

4th July, 1944.

of the judgment-debtor who had applied to the Court for stay of the sale on the ground of his being an insolvent had been dismissed and an appeal had been filed against the dismissal with an application for *interim* stay. Two days prior to the 5th August, the closing date for the sale, the parties agreed to the sale being continued till the 12th August, the date fixed for the disposal of the appeal of the judgment-debtor. On the 5th August, the executing Court merely directed the deposit of the decree-holder for the expenses of the continuance of sale to be received and on the 8th August, ordered the continuance of the sale till the 12th August. The appeal of the judgment-debtor was dismissed on the 12th and on the same day the property was sold for its full value. On a contention that the sale was bad inasmuch as there was no order for the continuance of the sale made on the 5th August, and that the order of the 8th August, was too late and hence ineffective,

Held, that in view of the agreement between the parties and the order of the Court there was no material irregularity in the proceedings, still less any illegality. The agreement coupled with the order of the Court effectively continued the sale to the 12th August. As the sale was never adjourned and was being all along continued from day to day no fresh proclamation ever became necessary.

• *Sir Herbert Cunliffe, K.C.* and *P. V. Subba Rao* for Appellants.

A. K. Pillai and *R. Parikh* for Respondents.

Their Lordships' judgment was delivered by

LORD GODDARD.—This appeal arises out of an application by the respondents, who are judgment-debtors, to set aside a sale of certain lands belonging to them sold under an order of the Court and which were bought by the second appellant. The application was made in the first instance to the Subordinate Judge of Mayavaram who refused it; on appeal, the High Court of Madras reversed his decision and set the sale aside on the ground that it took place on a date subsequent to the latest date prescribed by the Court for the sale and was therefore illegal.

There is no dispute as to the facts which can be quite shortly stated. The 1st appellant had obtained judgment against the respondents for something over Rs. 25,000 and interest. He applied to the Court for an order by way of execution for the sale of the respondents' lands and on 8th April, 1935, the Subordinate Judge made the order and directed a proclamation of sale to be made and fixed the date of sale for 8th July. The sale was duly proclaimed but on the day fixed for sale no bid was forthcoming and the sale was by order of the Court continued from day to day to 29th July, and on that day an order was made directing the sale to be continued till 5th August. Meanwhile on 7th July the respondents had made an application to the Court to stay the sale on the ground that he was insolvent. The Subordinate Judge had dismissed this application on 10th July. On 2nd August, three days before the day fixed for closing the sale the respondents filed an appeal to the Court of the District Judge against the refusal to stay the sale and in his petition he asked that an *interim* stay might be ordered pending the disposal of his petition. The next day, 3rd August, an agreement was made with regard to the application for an *interim* stay between the advocates of the respective parties which was duly endorsed on the petition. It was in these terms:

"On behalf of the decree-holder I (that is the advocate for the decree-holder) undertake to have the execution sale carried on from day to day till 12th instant."

The endorsement by the respondents' advocate was "In view of the undertaking of the respondent I do not now press this petition." Nothing could be clearer than this. The parties agreed that the sale was to be continued from 5th August to 12th August on which date the appeal was due to be heard as it in fact was. On the same day, 5th August, the appellants' pleader lodged a memo. in the Court of the Subordinate Judge reciting the agreement and paid the necessary fee for continuing the sale for one week from that date. It does not appear that any order of the Court was made on that date for the continuance of the sale, and their Lordships assume that none was made, but on 8th August, the Subordinate Judge did make an order that the sale be continued till 12th August, which was in accordance with what the parties had agreed. On that date the appeal was dismissed and the property was thereupon sold to the 2nd appellant at a price which both Courts below have found to be the full value: so the respondents have in any case sustained no injury. They then applied to the Subordinate Judge for an order setting aside the sale, apparently on the grounds that it was illegal for the sale to have taken place on 12th August, when by the order of 29th July, the 5th August had been

appointed as the latest day for closing the sale and also on the ground that there had been no proclamation of the sale for 12th August. The Subordinate Judge, as already stated, refused this application, but the High Court in reversing his decision held that the sale was entirely illegal. In this judgment they said :

"But there was no sale on 5th August. Nor was the auction closed on that date. On that day the decree-holder represented that the auction sale should be continued for another week and deposited Rs. 3-8-0 for the expenses of conducting the sale on seven more successive days. The Court passed no order on this request other than an order that the money so paid should be accepted. . . . The Court's action in not selling the property on 5th August, or concluding the sale on that day was highly irregular inasmuch as it had been widely proclaimed that that was the latest date of sale. Its action in selling the property on a date subsequent to that date was positively illegal."

It will be observed that the High Court make no reference to the agreement between the advocates of the respective parties for the continuance of the sale but appear to treat the matter as though the appellants' representative had obtained *ex parte* a continuance of the sale. Nor do the Court make any reference to the order of 8th August, and their Lordships can only suppose that these two important facts were not brought to the attention of the Court as they cannot think that, had they been, the appeal would have been allowed. In view of the agreement and the order of the Court their Lordships are unable to see that there was any material irregularity in the proceedings, still less any illegality. It was contended before the Board that as no order for the continuance of the sale was made on 5th August the order of 8th August was too late and therefore ineffective but their Lordships cannot accept that argument. Even assuming that in view of the agreement between the parties any order was necessary, and it is not to be taken that in their Lordships' opinion it was, they are of opinion that the agreement came to on 3rd August coupled with the order of 8th August, effectively continued the sale to 12th August. It may be observed that the sale was never adjourned ; it was all along continued from day to day and consequently no fresh proclamation ever became necessary.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the order of the High Court set aside with costs and the order of the Subordinate Judge restored. The respondents will pay the costs of the appeal.

Solicitors for Appellants : *Hy. S. L. Polak & Co.*

Solicitors for Respondents : *Harold Shephard.*

V.S.

Appeal allowed.

[PRIVY COUNCIL.]

(On appeal from the Court of Judicial Commissioners at Peshawar.)

PRESENT :—LORD THANKERTON, LORD JUSTICE LUXMOORE AND SIR MADHAVAN NAIR.

K. S. Agha Mir Ahmad Shah and another

.. *Appellants**

v.

Mir Mudassir Shah and others

.. *Respondents.*

Evidence—Death in earthquake—No presumption of survival of elder by younger person—Onus of proof as to order in which death occurred.

Civil Procedure Code (V of 1908), Order 16, rule 14—Court's power to examine witness suo motu—Discretionary.

When two individuals perish in a common calamity like an earthquake, and the question arises as to who died first, in the absence of evidence on the point, there is no presumption in law that the younger survived the elder. Such a question is always a pure question of fact, the onus *probandi* lying on the party who asserts the affirmative.

The power of the Courts under Order 16, rule 14, Civil Procedure Code to examine witnesses on its own motion is discretionary and the Judicial Committee will not exercise that discretion when the Courts in India have refused to exercise it.

D. N. Pritt, K. C. and R. K. Handoo for Appellant.

J. M. Pringle for Respondent.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from the decree of the Court of Judicial Commissioner, North West Frontier dated 13th June, 1941, which affirmed the decree of the Senior Subordinate Judge, Peshawar, dated 23rd December, 1938, by which a suit brought by the appellants against the respondents was dismissed.

The appellants are the parents of Lady Shamas Shah, who was the wife of a retired officer of the political service of the Government of India. The respondents are his nephews.

Lady Shamas Shah and her husband lost their lives in the earthquake at Quetta, which occurred early in the morning of 31st May, 1935. Sir Shamas Shah was 68 at the time of his death, and his wife 26. They had no children. At the time of the earthquake, Sir Shamas Shah, his wife, her younger sister, and one Mussammat Faruq, a maid, servant were staying in his bungalow which collapsed in the earthquake. They were buried under the debris.

Opposite their bungalow was the bungalow in which the appellants lived with their son Bashir Ahmmed and certain other persons. This bungalow also collapsed; but the appellants extricated themselves from the ruins; and accompanied by their son hurried across to the residence of Sir Shamas Shah to find out what had happened there.

It is admitted that Shamas Shah and his wife's sister were already dead when their bodies were recovered from the ruins. It is also admitted that Mussammat Faruq survived the disaster: as to Lady Shamas Shah, the appellants set up the case that she was "taken out alive" when she was extracted at about the same time when her husband's body was recovered and that she thus survived him, though she expired immediately thereafter.

The respondents denied that Lady Shamas Shah was "taken out alive" from the crumbled bungalow, and that she survived her husband. They contended that not having survived him, she did not inherit from him and the appellants had no title to the suit property on that ground.

The parties are Muhammadans. As Sir Shamas Shah died without issue, assuming Lady Shamas to have survived him, his heirs on his death, under the Muhammadan Law, were—

- (1) his widow who became entitled to a fourth part of the estate, and
- (2) his nephews, the present respondents, who took the remaining three-quarters.

On the death of Lady Shamas Shah, her parents, the present appellants, became entitled to the fourth part which she, their daughter, had inherited from her husband. If she did not survive her husband then the respondents were entitled to the entire estate.

The decision of the dispute thus depended upon the question "Did Lady Shamas Shah survive her husband," and on this basis, issue 4 was framed which was, "Did one quarter of the property devolve on Lady Shamas Shah on the ground that she survived her husband?"

The onus of proving the above issue was rightly thrown on the appellants who sought to discharge it (1) by adducing direct evidence of witnesses who said they saw that Lady Shamas Shah was taken out alive from the debris, and (2) alternatively, in the event of the evidence as to her survival being found insufficient, by relying on what they alleged to be a presumption of law, that where two persons have died in circumstances rendering it uncertain which of them survived the other, the younger should be deemed to have survived the older, and consequently, that Lady Shamas Shah being younger of the two should be presumed to have survived her husband.

The respondents adduced evidence in support of their case. The trial Court held that the evidence adduced by the appellants was not above suspicion, and that there is no presumption in law that in a common calamity the younger of the

two deceased persons should be deemed to have survived the elder. In the result the suit was dismissed. It may be mentioned here that there was on record a statement that had been made by Mussammat Faruq before a Commissioner, one Mrs. Quasim, who had been directed by the Court to take her evidence. That statement supports the version of the appellants regarding the survivorship of Lady Shamas Shah. It is obvious that the statement being that of the only inmate of the bungalow that survived the disaster would, if found true and acceptable, be of great value in the decision of the case, but it was excluded from consideration by the trial Judge owing to an infirmity that attached to it. He also refused to summon the said Mussammat Faruq as a witness under Order 16, rule 14, Civil Procedure Code, under which a Court in India may of its own motion summon as witnesses strangers to the suit, as he was of opinion that the appellants had inexcusably omitted to examine her. In appeal, the Judicial Commissioners agreed with the trial Judge on all the points urged before them including what was alleged as the wrongful exclusion of the evidence of Mussammat Faruq. They also refused to remand the case for the examination of this witness. Eventually, the appeal was dismissed, as it was not proved that Lady Shamas Shah survived her husband.

In this appeal before the Board, it may be mentioned at the very outset, that Mr. Pritt, the learned Counsel for the appellants, has rightly not relied on the so-called presumption in law regarding the survivorship of Lady Shamas Shah urged in the Courts below. It is clear to their Lordships that when two individuals perish in a common calamity and the question arises as to who died first, in the absence of evidence on the point, there is no presumption in law that the younger survived the elder. As was observed by the Lord Chancellor, Lord Campbell, in the leading English case on the subject, *Wing v. Angrave*¹, "... such a question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative." This rule has not been modified in India by any statute as has been done in England by section 184 of the English law of Property Act, 1925. The learned Counsel however urged that though there is no presumption in law the survivorship of the younger should be considered as "an element in the evidence" bearing on the question as to who died first. As to this, their Lordships need only observe that the distinction which the learned Counsel seeks to draw is very thin; it is obvious, that in a disaster like an earthquake, it is a matter of pure chance whether the younger or the elder would be killed first. It may well be that the younger might receive injuries which cause instantaneous death, while the elder might merely be buried under the debris and eventually die of suffocation.

The case presented before the Board appears to be one of concurrent findings of fact not involving any substantial question of law which according to the usual practice would necessarily entail its dismissal; but it was strongly urged by the learned Counsel that the rule is not absolute and that there are exceptional circumstances in the case which, if attended to would persuade their Lordships to hold that the findings should be reopened. The main argument is that the statement of Mussammat Faruq was wrongly excluded from consideration, and that the Board should in the interests of justice remand the case to India for fresh disposal after taking her evidence. To appreciate this argument it is necessary that the circumstances which led to the exclusion of her statement should be examined.

The material circumstances are these: A contemplated settlement of the case being found impossible, the Court appointed on the 2nd December, 1937, one Mrs. Quasim as Commissioner to take the evidence of the appellants' "female witnesses," the second appellant, and Mussammat Faruq. In pursuance of that order Mrs. Quasim examined them both on the 19th December. She appended the following note to the evidence:

"Pleader Said Ali Shah (pleader for respondents 1 and 4) had come to my compounder who informed him that the statement will be taken at 3 p.m. I waited for 15 minutes after which I took the ladies' statements. No pleader on either side appeared. Therefore no cross-examination. Plaintiffs' attorney present, Agha Chan Badshah."

In Order, No. 11 dated 20th December, 1937, the Court noted

"counsel as before In view of the finding of the Court and request for change of date as pleaders were ill, she should have postponed recording the statements."

On the 24th February, 1938, in Order No. 13, the following order was passed.

"Parties and counsel as before. Plaintiff 1 absent again. Furnishes a medical certificate of being unable to attend. Counsel agree to the plaintiff being examined by open Commission. Issue Commission for K. S. Mir, Ahmad Shah to Dr. Nur Elahi pleader. For (2) to Dr. Miss Rishi . . ."

The expression "For (2) to Dr. Miss Rishi" meant that the 2nd plaintiff was to be examined by Dr. Miss Rishi. She was accordingly examined on the 27th March, 1938. On the 14th April, 1938, after noting the names of the counsel for the plaintiff and defendant, the Court passed the following order :

"Two of P. W.'s of N. W. F. P. will be produced in Court it is stated. Balance of P. W.'s statements will be recorded by Commissioner already appointed; also of D.W.'s. to be taken by the same Commissioner."

Some more orders were passed respecting the examination of witnesses and the production of evidence. The appellants and respondents closed their cases on the 25th August, 1938, and 2nd November, respectively ; and the case was posted to the 7th December, 1938, for arguments.

On the above date the counsel for the appellants put in an application to the effect that the statement of Mussamat Faruq should be recorded. On this, the Senior Subordinate Judge passed a long order which after referring to the relevant orders concluded as follows :

"obviously the statement of Mussamat Faruq recorded on the 19th December, 1938, cannot be admitted in evidence. This must have been obvious to the plaintiffs' counsel on the 14th April, 1938, and he should have then asked the Court for orders for the examination of this witness."

Counsel for the plaintiff pleads an unintentional omission and asks me to summon Mussamat Faruq as a Court witness under Order 16, rule 14, as she is a vitally important witness. Counsel for defendants object on the ground that the evidence of both parties is closed. It is contended also that the omission was intentional on the part of the plaintiffs' counsel.

I have considered this question carefully and am of opinion that it would be seriously detrimental to the defendants' case to admit this witness at this stage. I do not consider that it is the duty of the Court to remedy an omission by a party to the suit which may be intentional or if not, must be due to neglect."

The following extract from the judgment of the Judicial Commissioners explains their reasons for not considering the statement of Mussamat Faruq and for their refusal to remand the case for examining her :

"We are of opinion that the evidence of Mst. Faruq given before Mrs. Quasim cannot be taken into consideration ; nor should the plaintiff be given a further opportunity of examining her. We cannot presume that the Counsel for defendants 2 and 3 was notified in time so as to appear before Mrs. Quasim on the 19th December. These defendants had no opportunity of cross-examining her. It is quite apparent that the plaintiffs were negligent in not having her examined later. Both she and the 2nd plaintiff had appeared before Mrs. Quasim. When the second commission was issued to Miss Rishi the 2nd plaintiff was examined but no attempt was made to get Mst. Faruq examined and counsel for the plaintiffs on two occasions gave statements which show clearly that all the evidence which was to be taken at Peshawar had been completed. We are not prepared to remand the case for the examination of this witness and we cannot take the evidence which she gave before Mrs. Quasim into consideration."

It appears to their Lordships that full and cogent reasons have been given by the learned Judges for rejecting the evidence of Mussamat Faruq and for refusing to call her as a court witness. It is true that counsel for respondents 1 and 4 knew that the Commissioner would examine her on the 19th December, but it is not a necessary inference from this that the counsel for respondents 2 and 3 who was a different individual had timely notice of the information. Indeed it would be very dangerous to act upon the evidence of this witness as it had not been subjected to cross-examination. The Senior Subordinate Judge indicated his opinion to the parties at a very early stage that Mrs. Quasim should not have recorded the statement of Mussamat Faruq on the 19th December. In consequence when Miss Rishi was appointed as Commissioner, appellant 2 who had already been examined on the 19th December by Mrs. Quasim was examined afresh by the

appellants, but not Mussammat Faruq. The evidence of both these witnesses was subject to the same infirmity. No reasonable explanation for the omission to examine this witness before Miss Rishi has been offered. It may be that the appellants did not want her evidence at all, for reasons best known to themselves, or that they thought that she might be produced and examined in Court. Referring to his order passed on the 14th April, 1938, the Senior Subordinate Judge remarks "orders were also passed for the examination of those of the witnesses who were residing outside N. W. F. P. In this order no mention is made of Mussammat Faruq who was residing in Peshawar City." There is great force in the observation of the Judicial Commissioners that the appellants would seem to have abandoned the idea of producing Mussammat Faruq in Court. On the 25th August, 1938, their counsel filed the statement that their case was closed, and the request that the statement of Mussammat Faruq should be recorded was made on the 7th December, when the case was taken up for argument, more than a month after the respondents had closed their case on the 2nd November, 1938. In the circumstances the Courts below were right in rejecting her evidence. It also appears to their Lordships that they were right in not acceding to the request of the appellants to examine Mussammat Faruq whether their omission to examine her was intentional or due to neglect. The power of the Courts under Order 16, rule 14, Civil Procedure Code, to examine witnesses on its own motion is discretionary. The Courts in India have in this case for very good reasons refused to exercise their discretion in favour of the appellants, and their Lordships also are not prepared to exercise it. No case has been made out for re-opening the concurrent finding of the Courts below that it has not been proved that Lady Shamas Shah survived her husband. In the circumstances their Lordships would accept the finding and humbly advise His Majesty that this appeal should be dismissed with costs.

K.S.

Appeal dismissed.

[PRIVY COUNCIL].

(On appeal from the High Court of Judicature at Bombay).

PRESENT :—LORD THANKERTON, LORD WRIGHT AND SIR MADHAVAN NAIR.

Narayan Jivangouda Patil and another

*..Appellants**

v.

Puttabai and others

.. Respondents.

Limitation Act (IX of 1908), section 15—Scope—Injunction restraining defendant from interfering with plaintiff's possession—Institution of suit by defendant for possession not thereby restrained—Period of continuance of the injunction cannot be excluded in computing limitation for defendant's suit for possession.

The plaintiff in possession obtained in the Courts in India a declaration that he was in possession and a permanent injunction restraining the defendant therein from dispossessing him and receiving rents from the tenants. The main contest in the case was as to the validity of the defendant's adoption. Though the adoption was held to be invalid by the Courts in India, the Judicial Committee on appeal set aside that decision holding that the defendant was validly adopted thereby definitely establishing the defendant's title to the properties. Thereupon the defendant brought a suit for possession of the suit properties when his title had become extinguished by adverse possession claiming the benefits of section 15 of the Limitation Act.

Held, that the defendant was not prevented from instituting a suit for possession in 1920 (when the suit against him for injunction was filed), or at any time before the expiry of the period of limitation and section 15 of the Limitation Act cannot help him.

Their Lordships' Judgment was delivered by

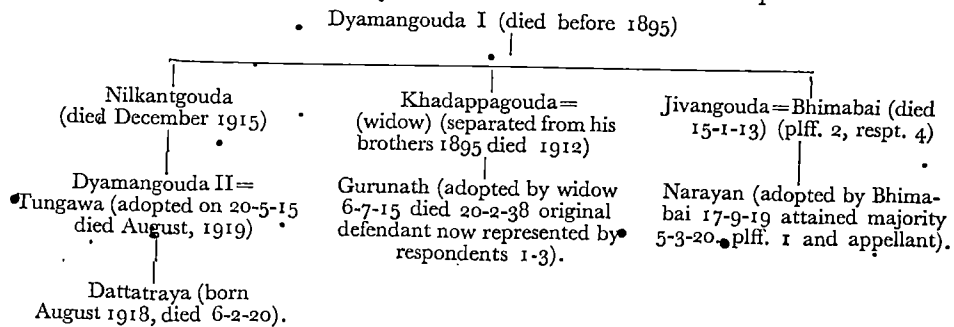
SIR MADHAVAN NAIR.—These are consolidated appeals from a judgment and two decrees of the High Court of Judicature at Bombay dated 14th January, 1938, affirming a decree of the First Class Subordinate Judge of Dharwar dated 31st October, 1936, and an order of that Judge dated 21st November, 1936.

The questions which arise in the appeals are :

- (1) Whether the plaintiffs' suit is barred by limitation.
- (2) Whether Narayan (plaintiff No. 1, hereinafter referred to as the appellant) was entitled to restitution or other relief consequent upon a decision of the

Privy Council in *Bhimabai v. Gurunathgouda Khandappagouda Patil*¹ hereinafter mentioned.

The parties to the suit are Hindus governed by the Bombay School of the Mitakshara law. The table given below shows their relationship.



One Dyamangouda I and his three sons Nilkantgouda, Khadappagouda and Jivangouda, formed a joint and undivided Hindu family. Dyamangouda died sometime before 1895 leaving him surviving his three sons who took the family properties including the properties now in suit by survivorship. In 1895, Khadappagouda separated from his two brothers who continued joint, and the properties now in suit are those which were allotted to the two brothers jointly. The bulk of the properties consisted of watan lands. Khadappagouda died in 1912, leaving a widow but without male issue. On 6th July, 1915, she adopted Gurunath, the defendant in the present suit, who died on 20th February, 1933, subsequent to the High Court judgment. His legal representatives have been since brought on the record and they are now respondents Nos. 1 to 3.

On 15th January, 1913, Jivangouda died leaving his widow Bhimabai (plaintiff No. 2, now respondent No. 4) but without male issue. On 17th November, 1919, she adopted the appellant who attained his majority on 5th March, 1920.

In December, 1915, Nilkantgouda died leaving him surviving Dyamangouda II whom he had adopted as his son on 20th May, 1915. Dyamangouda died in August, 1919, leaving a son Dattatraya who was born in August, 1918, and a widow Tungawa.

On 6th February, 1920, Dattatraya died unmarried and the appellant became entitled by survivorship to all the joint family properties subject to the rights of Tungawa and Bhimabai for maintenance. Tungawa took possession of the properties to the exclusion of the appellant.

Disputes, however, arose between Tungawa and Gurunath, the latter claiming that he was entitled to watan properties in preference to Tungawa. These disputes were referred to two arbitrators who made an award on 23rd February, 1920, in terms of which a consent decree was afterwards passed by the First Class Subordinate Judge of Dharwar on 24th February, 1920. On the same date, purporting to act under its terms, Tungawa handed over the properties now in suit to Gurunath who has since been in sole and exclusive possession of them. Subsequently, Gurunath applied for mutation in his favour in the Revenue Records; a similar application had been made by the appellant also, who had by this time come of age on 5th March, 1920. The Mamlatdar of Gadag ordered mutation in favour of Gurunath, but this order was set aside by the District Deputy Collector.

Thereupon, on 25th November, 1920, Gurunath filed a suit (Suit No. 588 of 1920) in the Court of the First Class Subordinate Judge of Dharwar against Bhimabai, the appellant, and some others, challenging the adoption of the appellant, and praying for cancellation of the order of the District Deputy Collector, a declaration that he was in possession, and a permanent injunction restraining the defendants

1. (1932) 64 M.L.J. 34 : L.R. 60 I.A. 25 : I.L.R. 57 Bom. 157 (P.C.).

therein from dispossessing him and receiving rents from the tenants. On the same date Gurunath filed an application for and obtained a temporary injunction to the same effect as the permanent injunction applied for by him. On 1st April, 1921, Bhimabai and the appellant filed a written statement in which Gurunath's claim was denied and the title of the appellant was asserted. The order for temporary injunction was confirmed by the Subordinate Judge on 6th February, 1922, and by the High Court in appeal on 22nd January, 1924. The main contest in the case was as regards the validity of the appellant's adoption. The Courts in India held that his adoption was invalid, but on appeal to His Majesty in Council, the Board set aside their decision, holding that the appellant was validly adopted by Bhimabai as a son to her husband Jivangouda—see the decision in *Bhimabai v. Gurunathgouda Khandappagouda Patil*¹. The Order in Council giving effect to the judgment was made on 10th November, 1932. The appellant's title to the lands in question was thus definitely established.

Thereupon, on 25th November, 1932, the appellant and Bhimabai (as plaintiffs Nos. 1 and 2), brought the suit out of which this appeal arises in the Court of the First Class Subordinate Judge of Dharwar against Gurunath, claiming possession of the suit properties on the strength of title established in the appellant's favour by the judgment of the Privy Council. Appellant No. 2 was subsequently brought on the record as plaintiff No. 3, on his own application on the ground that he was the donee of some of the properties. Various pleas were raised by Gurunath in his written statement of which the only one with which the Board are now concerned is that the appellant's title to the suit properties was extinguished by reason of his adverse possession for over 12 years.

The appellant contended first that the suit was in time, alleging that the cause of action arose on 4th November, 1932, or on 25th November, 1930 (see para. 12 of the plaint). This plea has not been urged before the Board; he also pleaded that even if the cause of action arose on an anterior date, the bar of limitation was saved because of sections 14 and 15 of the Indian Limitation Act. These sections run as follows :

"Section 14 (1). In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is presented in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation II.—For the purposes of this section, a plaintiff or an appellant resisting an appeal shall be deemed to be prosecuting a proceeding."

Section 15, sub-section (1) runs as follows :

"Section 15 (1). In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the days on which it was withdrawn, shall be excluded."

The exclusion from the bar of limitation was pleaded in para. 18 of the plaint which stated as follows :

"But if it were to be held that the cause of action accrued to the plaintiffs still earlier, the plaintiffs submit that in computing the period of limitation prescribed for this suit the time from 26th November, 1920 to 4th November, 1932, should be excluded, on the ground *inter alia* firstly that the institution by them of any suit for possession and mesne profits or for recovery of rent, etc., was in effect continuously stayed first by the temporary injunction hereinbefore referred to and followed by a permanent injunction as embodied in the decree of this Court which was confirmed by the High Court, and secondly and without prejudice to the previous grounds that he was defending the said suit and prosecuting the said appeals in effect prosecuting another suit founded upon the same cause of action, namely, the validity of his adoption with due diligence and in good faith against the defendant herein."

It will be observed that the first part of this statement refers to section 15 of the Limitation Act and the second part to section 14.

¹. (1932) 64 M.L.J. 34 : L.R. 60 I.A. 25 : I.L.R. 57 Bom. 157 (P.C.).

Meanwhile, on 4th November, 1935, the appellant and Bhimabai filed an application before the First Class Subordinate Judge under sections 144 and 151, Civil Procedure Code, praying for an injunction against Gurunath, for possession and mesne profits, damages, and compensation and other reliefs, by way of restitution consequent on the reversal of the decree of the Trial Court, which they contended was the effect of the judgment of the Privy Council in *Bhimabai v. Gurunathgouda Khandappagouda Patil*¹ and the Order in Council dated 10th November, 1932.

In the suit the Subordinate Judge held that "time certainly began to run against the appellants from at least 24th February, 1920," the appellant could not claim the benefit of either section 14 or 15; and that his title was thus extinguished by the adverse possession of Gurunath; he therefore passed a decree dismissing the suit on the 31st October, 1935.

The Subordinate Judge also dismissed the application dated 4th November, 1935, on the following grounds: "In view of the findings in the suit, that it was barred by time and adverse possession and the plaintiffs (appellants) have no right to the possession of the property, none of the reliefs prayed for survives."

On appeal to the High Court both the decree of the Subordinate Judge in the suit, and his order on the application were confirmed, and a decree dated 14th January, 1938, was drawn up in each appeal, dismissing the same with costs in favour of Gurunath.

In this appeal, the only question argued before the Board is that which relates to limitation. Having regard to the findings, Sir Thomas Strangman, the learned counsel for the appellants, conceded that the title of the appellant to the suit properties must be held to have been extinguished by adverse possession, if he is not able to show that in computing time the appellants are entitled to claim the benefits of section 14 or of section 15 of the Limitation Act. With respect to section 14 of the Act, it is urged that the appellants are entitled to deduct the period of the pendency of Suit No. 588 of 1920 which ended in the Privy Council in the appellant's favour, but the learned counsel has not been able to convince their Lordships how the words of section 14 can be applied to the facts of the case, and at a very early stage in the arguments that contention was given up.

It is clear to their Lordships that section 15 of the Act also cannot help the appellants. Having regard to the words of section 15, the question to be considered is whether the institution of the suit, the decree in which is now under appeal, has been stayed by any injunction or order; it is argued that the injunction passed in Suit No. 588 of 1920 and embodied in the decree prevented the appellant from filing a suit for possession, and therefore he is entitled to deduct the whole period from the date of the temporary injunction to the date of the dissolution of the permanent injunction by the Privy Council. In this connection attention may be drawn to the injunction passed by the Subordinate Judge and also to the decree of the Court. In his application for temporary injunction made on 15th November, 1920, Gurunath prayed as follows:

"The Court may therefore be pleased to issue an injunction restraining the defendants from taking away any crops whatever in the lands mentioned in schedules A, B and C annexed hereto, from causing obstruction in the Vahiwat (management) of the plaintiff, from taking rent notes from the plaintiff's ryots and recovering moneys (from them) from causing obstruction to plaintiff in taking away the crops raised by him and in plaintiff's ryots taking away the crops raised by them, and from obstructing plaintiff in recovering the amount (rent) from his ryots."

On the same date, the Subordinate Judge granted *ex parte* a temporary injunction as prayed for. As already stated this was confirmed on 6th February, 1922, and it continued until it was dissolved by the decision of the Privy Council. The decree passed by the Subordinate Judge in Suit No. 588 of 1920 after declaring the title of Gurunath to the properties, stated as follows:

"We hereby order that defendants Nos. 1 to 5 either jointly or severally should not deprive the plaintiff of the possession of the whole of the property or any portion thereof, that

1. (1932) 64 M.L.J. 34 : L.R. 60 I.A. 25 : I.L.R. 57 Bom. 157 (P.C.).

they should not cause obstruction in any way to the plaintiff in removing the crops grown by him or in accepting or recovering the amount of rent of the said lands from the tenants of those (lands). We also order that they should neither accept nor recover the amount of the rent of the said lands in suit or of any thereof. . . ."

The question whether in a particular case a party has been restrained by an injunction or order from instituting a suit must always depend for its decision upon the order, or the decree, made in the case. It appears to their Lordships there is nothing in the injunction or in the decree to support the contention that the appellant was prevented from instituting a suit for possession in 1920, or at any time before the expiry of the period of limitation. The various restraints imposed on the appellant by the decree cannot be made to mean by any process of interpretation that he is thereby prevented from instituting a suit for possession for the suit properties. It is not maintained that there is any express order restraining him from instituting such a suit. Mr. Parikh, the learned counsel for the respondents, said that the injunction or order relied upon, to be effective, should contain an express prohibition, but it is not necessary to consider that point as their Lordships are satisfied that there is no prohibition, either express or even implied, in the injunction or the decree in the present case, which restrains the appellant from instituting a suit for possession. Sir Thomas Strangman contended strongly that since the title of the contending parties was involved in the suit it would be quite futile to institute a suit for possession. Their Lordships are unable to appreciate this point, for the institution of a suit can never be said to be futile, if it would thereby prevent the running of limitation.

For the above reasons their Lordships hold that the appellant's suit was barred by limitation, and also that the appellant was not entitled to restitution and other reliefs claimed by him in his petition under section 144 and section 151, Civil Procedure Code. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs of the contesting respondents.

K. S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Marudamuthu Pillai

*Appellant**

v.

G. K. Radhakrishna Chetty and others

Respondents.

Civil Procedure Code (V of 1908), section 11, Explanation 6—Scope—Suit by creditor under Order 21, rule 63 against claim order—If representative suit—If operates as constructive res judicata in execution proceedings by another creditor.

R gifted a house to his wife who in turn sold it to M who leased it back to R. A creditor of R brought a suit under Order 21, rule 63 of the Civil Procedure Code against the order in claim proceedings holding that the gift by R and the sale by his wife were true. The suit and the appeal therefrom were dismissed. Later on, another creditor X sought to proceed against the property. On a claim petition being preferred it was held as before that the gift and sale were true. X then filed a suit to establish his right to proceed in execution against the house contending that the gift and the sale were nominal.

Held, that the creditor in the first suit was not litigating on behalf of the general body of creditors but was merely concerned with having it declared that the gift and sale were nominal in order that he might proceed against the property. He was not concerned with the other creditors and the suit was not one under section 53, Transfer of Property Act. Accordingly the subsequent suit by X was not barred by *res judicata*.

Appeals against the decrees of the Court of the Subordinate Judge, Coimbatore, in A. S. Nos. 179 and 180 of 1942 preferred against the decrees of the Court of the District Munsiff, Erode, in O. S. Nos. 115 and 116 of 1942.

S. T. Srinivasagopalachari for Appellant.

K. Aravamudha Aiyangar and F. R. Balakrishnan for Respondents.

* S. A. Nos. 1272 and 1273 of 1943.

The Court delivered the following

JUDGMENT.—On the 18th July, 1904, one Ramaswami gifted the suit house to his wife. On the 8th February, 1905, by Ex. D-1, the wife sold the property to the appellant, who leased it back to Ramaswami. In O. S. No. 1094 of 1905 on the file of the District Munsiff of Erode, a creditor of Ramaswami brought a suit under Order 21, rule 63 against the claim order holding that the gift by Ramaswami and the sale by his wife were true.* That suit was dismissed, as was the appeal to the District Court. Later on, the first respondent sought to proceed against the property. On the claim petitions, it was held as before that the gift and sale were true. Consequently, the defeated creditor, who is the first respondent, filed O. S. No. 115 of 1942 to establish his right to proceed in execution against that property; and he contended therein that the gift and the sale were nominal. At the same time, the appellant filed O. S. No. 116 of 1942 against the sons of Ramaswami, who has since died, to recover the property. These suits were tried together; and it was held that the gift and sale were nominal transactions. Appeals by the appellant to the Subordinate Judge of Coimbatore were unsuccessful.

The principal point argued in appeal is with regard to the effect of the earlier decisions in O. S. No. 1094 of 1905 on the file of the District Munsiff of Erode and in the appeal therefrom, A. S. No. 43 of 1907, on the present litigation. It is contended by the appellant that although O. S. No. 1094 of 1905 was apparently brought by the creditor for himself alone, yet he must be deemed to have been litigating on behalf of the general body of creditors and that therefore under explanation 6 to section 11 of the Civil Procedure Code, the earlier decree would be *res judicata* in the present litigation. The lower Courts discussed this question briefly and very generally and came to the conclusion that the earlier decree was not *res judicata*, because the parties were not the same. It did not consider the effect of explanation 6 to section 11 of the Civil Procedure Code.

It is very clear that the creditor in O. S. No. 1094 of 1905 did not intend to litigate on behalf of the general body of creditors and did not in fact do so. He was merely concerned with having it declared that the gift and sale were nominal, in order that he might proceed against the property. He was not concerned with the other creditors. A somewhat similar question came up for consideration in *Jagannath v. Ganesh*¹ and *Pethuraja Kone v. Muthuswami Iyer*², where it was held that when a creditor merely resists a claim by a claimant, his resistance in the summary proceedings cannot be deemed to be on behalf of all the creditors. The learned advocate for the appellant however relies on brief passages in the two judgments. In the Allahabad case, it was said :

"We say nothing as to what might be the effect of the order under section 280, section 281 or section 282 (Order 21, rules 60, 61, and 62) in favour of one decree-holder so far as the other decree-holders were concerned who had obtained attachment."

King, J., in *Pethuraja Kone v. Muthuswami Iyer*² said :

"Now, of course, a suit by a creditor to set aside an adverse claim may well in certain circumstances be in essence a suit under section 53 of the Transfer of Property Act."

The learned Judge was considering section 53 as it now stands after the recent amendment. Under the old section 53 there was no obligation to file a suit in a representative character. A case that has been referred to by both sides is *Kumara-velu Chetty v. Ramaswami Iyer*³, a decision of the Privy Council. In that case, a suit purported to be under Order 1, rule 8, but the terms of that order were not properly complied with, e.g., notice was not sent; nor was permission of the Court obtained. This High Court held that despite these defects the decision in that suit did operate as *res judicata* in a subsequent litigation between a person having the same right and the same defendant. Their Lordships disagreed; but reading their judgment as a whole, it is clear that they avoided discussion of the general question whether

1. (1896) I.L.R. 18 All. 413.
2. (1941) 2 M.L.J. 784.

3. (1933) 65 M.L.J. 87; L.R. 60 I.A. 278 : I.L.R. 56 Mad. 657 (P.C.).

a decision in a suit not filed as a representative suit would operate as *res judicata* against persons who were not parties to the prior litigation. Their Lordships confined themselves to the question directly before them, namely, whether in a suit that purported to be a representative one, but in which the provisions of Order 1, rule 8, were not properly complied with, the decision would nevertheless operate as *res judicata* in a subsequent litigation by virtue of explanation 6 to section 11 of the Civil Procedure Code. Their Lordships held that it would not.

I do not consider that the present suit was one with regard to a right shared by others that would make explanation 6 to section 11 of the Civil Procedure Code applicable. In a suit under section 53 of the Transfer of Property Act, a creditor does not litigate with regard to a right, but, alleging that a certain alienation was in fraud of creditors, prays that the Court will declare that as far as he is concerned the transaction should be declared to be void. Mr. Srinivasagopalachari has referred to *Gurushiddappa v. Gurushiddappa*¹, as a case resembling in important respects the case now under consideration. There, the learned Judge held that the parties to the earlier litigation were the same as the parties in the later litigation. A suit was brought for redemption by a mortgagor against the Hubli Pinjrapole Samstha, and the President was impleaded as the representative of the Samstha. The Samstha raised an objection that the President could not represent the Samstha, but that objection was afterwards withdrawn and the suit proceeded on the basis that it was one properly framed against the proper defendant. The later suit was for the same relief by the same plaintiff against the same Samstha, but alleging that in the earlier suit, the Samstha was not properly represented. The second suit was framed as one under Order 1, rule 8. The learned Judge held, firstly, that the parties to the earlier litigation proceeded on the assumption that the Samstha was properly represented and that the plaintiff was therefore estopped from contending in the second suit that the Samstha was not properly represented. But the learned Judge went further and said that even if there was any technical defect in the former suit, it was covered by explanation 6 to section 11 of the Civil Procedure Code. It seems to me that the circumstances there were very different from what they are here. This is a case directly governed by *Pethuraja Kone v. Muthuswami Iyer*². When the present appellant put forward a claim in the claim application, he was clearly doing so on behalf of himself alone and in no sense of the word could he be said to have been litigating with regard to a right which he shared with others.

It is further contended that even if the earlier decision did not operate as *res judicata*, yet the sons of Ramaswami, defendants 2 to 4, should not be allowed to enjoy what may be left after the fifth defendant has realised his decree amount, and that they, at least, are bound by the earlier action. They cannot, however, be bound by the earlier decision unless that decision operates as *res judicata*. I have held that it does not. Moreover, the appellant and Ramaswami were co-defendants in the prior litigation and their interests were not opposed. It is said that as Ramaswami was in possession of the land under a lease and that in pursuance of the lease granted to Ramaswami defendants 2 to 4 are in possession, they are estopped from questioning the title of the appellant. The question of title was properly raised in the suit; and the Court has found that the sale was a nominal one, from which it would follow that the lease back to Ramaswami was also nominal; so that the possession of Ramaswami was not under the lease as a tenant of the appellant, but in his own right as the owner of the land. For the same reason defendants 2 to 4 are also in possession as the owners of the land.

Both appeals are dismissed with the costs of the first respondent in S. A. No. 1272 of 1943 and of the other respondents in S. A. No. 1273 of 1943.

K.S.

Appeals dismissed.

1. I.L.R. (1937) Bom. 326.

2. (1941) 2 M.L.J. 784.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Chutta Veetil Puthu Parambil Muhammad Koya and others . . . *Appellants**

v.

Ponmanichandakath Katheessa Bi and others

. . . *Respondents.*

Mahomedan Law—Will by Muslim migrated from British India to Ceylon—Whether testator had power under the law of Ceylon to dispose of the whole of the immovable property in British India—Sections 1 and 4 of the Ceylon Ordinance (XXI of 1844).

The testator, a Moplah, was born in Malabar, but in his youth had migrated to Ceylon. He acquired large properties in British India and Ceylon. His visits to India were few and far between and his wife and children were in British India. In codicils added to his will, he had stated that he had acquired his permanent domicile in Ceylon and had no intention of abandoning the same. He also made arrangements for his burial in Colombo. In the circumstances,

Held, that the testator had acquired a domicile in Ceylon and was governed by the law in Ceylon; that the Ceylon Ordinance (XXI of 1844) permits the testator to dispose of all his movable property wherever it might be and immovable property in Ceylon by will; but that the testator's immovable property in British India is governed by the *lex situs* which is the Muhammadan law according to which more than a third of such property cannot be disposed of by will.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar, at Calicut, dated 31st March, 1942 and passed in O. S. No. 39 of 1937.

Sir A. Krishnaswami Aiyar and C. K. Viswanatha Aiyar for Appellants.

K. Rajah Ayyar, S. Ramanujachariar, C. D. Venkataraman, B. Sitarama Rao and B. Pocker for Respondents.

The Court delivered the following

JUDGMENT.—On the 10th November, 1936, one Puthen Veetil Umbichi Haji, a Muhammadan of the Sunni sect, died in Colombo possessed of considerable property there and in British India. He left a will dated the 7th March, 1933, to which he added three codicils, dated respectively 25th September, 1934, 4th February, 1936, and 9th April, 1936. By his will and codicils he disposed of the whole of his estate. The broad question raised by the appeal is whether by reason of an Ordinance passed by the Legislative authority of Ceylon he acquired full testamentary power.

The testator was born at Chaliyam in Malabar in 1865. That this was the year of his birth has been agreed to by both sides in the course of the arguments in this Court. In his youth the testator migrated to Colombo where from a small beginning he built up a large fortune. His heirs according to Muhammadan law are his widow Katheessa Bi, his daughter Ayissa Bi and a cousin Moideen Kutti Haji, who died on the 5th December, 1936. The testator had another daughter Ameena Bi, who predeceased her father, leaving three sons and a daughter. The suit which has given rise to this appeal was filed by the heirs of Moideen Kutti Haji for the administration of the estate by the Court on the footing that the will was invalid. The Subordinate Judge held that the testator had acquired a domicile in Ceylon and that by reason of the Ceylon Ordinance No. XXI of 1844 he had full power to dispose of all his property by will. Consequently he dismissed the suit. The plaintiffs have appealed. They say that the testator had never abandoned his Indian domicile, but, even if he had, the Ceylon Ordinance gave him no power to dispose of immovable property situate outside the island of Ceylon. For reasons which we shall in due course state we are of opinion that the Subordinate Judge was right in holding that the testator had acquired a domicile in Ceylon and that the Ceylon Ordinance gave him full power of disposing of all his property situate in the island and of movable property wherever it might be, but we do not agree that it conferred upon him power of disposing of his immovable property in British India. His power of disposal of such property was merely that allowed by the Muhammadan law.

It is agreed that for the purpose of deciding this appeal it is not necessary to discuss in detail the directions given by the testator. It is sufficient to state that,

after making a number of bequests and constituting a waqf, he left one-third of the residue of his estate to his widow, one-third to his daughter Ayissa Bi and the remaining one-third to the children of his deceased daughter Ameena Bi. It is common ground that, if the estate falls to be administered according to Muhammadan law, the testator's cousin, Mohideen Kutti Haji is entitled as a residuary to three-eighths of what falls to the heirs.

We have no hesitation in agreeing with the Subordinate Judge that the testator abandoned his domicile of origin and acquired a domicile in Ceylon. It is true that his wife and daughters always lived in Malabar and that he bought a house in Calicut for the members of his family. It is in evidence that when a Moplah leaves Malabar to reside abroad his wife does not usually accompany him. It is the common practice for her to remain in her own locality and be content with visits from her husband. Throughout the fifty years during which the testator was living in Colombo, he paid very few visits to Calicut and his visits were of very short duration. He was married in 1913 when he was 48 years of age. After 1913 he visited Calicut only in 1915, 1918, 1926, 1927 and 1936; and as the Subordinate Judge points out, on each occasion special business brought him over to India. It is said that inasmuch as his wife and daughters were in Malabar and he had acquired a house in Calicut he must be deemed to have had an intention to return there when he had become too old for business and therefore the finding that he had abandoned his domicile of origin was erroneous.

This contention ignores important evidence to the contrary. The first codicil to the will contains the following recital:

"Whereas I have executed my said last will and testament in accordance with the laws governing intestate succession in Ceylon, inasmuch as I have acquired my permanent domicile in Ceylon, and I have no intention whatsoever of abandoning the said domicile."

There is evidence which cannot be contradicted and that it was his wish that he should be buried in Colombo and his wish was respected. In 1934 he applied for permission to be buried in the Wolfendal Mosque, Colombo. In this connection representations were made to the Chairman of the Municipal Council and Mayor of Colombo by Mr. A. R. A. Razik, another prominent resident of that city. In a letter dated the 17th August, 1934, and addressed to the testator the Mayor stated that he had personally no objection in the special circumstances of the case to the grant of the permission when actually required. The testator was in fact buried in this mosque. At one time the testator contemplated building a mosque in Colombo in order that he might be buried within its precincts. In addition to this evidence letters have been exhibited which show that the testator regarded Colombo as his permanent home, and oral testimony which is not open to question that the testator had stated that he wanted to remain in Colombo for the rest of his life.

As the testator had acquired a domicile in Ceylon, Ceylon Ordinance No. XXI of 1844 applied to him. The judgment of the Privy Council in *Ahamath v. Sarifa Umma*¹ makes it clear that the Ordinance conferred upon the testator complete power of disposing of all his property within the island of Ceylon. In these circumstances the bequests by the testator so far as they relate to his property in Ceylon cannot be challenged.

It is an accepted rule of international law that a testator can dispose of his property according to the law of the country of his domicile. The country of domicile here was Ceylon and the law of that country recognises full testamentary disposition. Therefore the testator had the right of disposing of his movable property in British India.

We shall now turn to the question of the bearing of the Ceylon Ordinance on immovable property held by the testator in British India. It is said that the Legislative authority in Ceylon has no power to alter the personal law of Muhammadans domiciled in the island so as to affect the succession to their immovable

property situate abroad. This may be the case, but the Court is not called upon to give a decision on the point, as it is quite clear from the Ordinance itself that the legislative authority did not intend to alter the Muhammadan law of succession in respect of immovable property outside the island. Section 1 of the Ordinance opens with these words :

"It shall be lawful for every person competent to make a will to devise, bequeath and dispose of by will all the property within this colony which at the time of his death shall belong to him or to which he shall be then entitled."

It will be observed that the power is limited to all the property *within* the colony. Section 4 deals with wills made beyond the limits of the colony and this only applies to dispositions of immovable property within the colony. Therefore the Ordinance leaves untouched the Muhammadan law in so far as immovable property situate abroad is concerned. In these circumstances there can be no doubt that the testator's immovable possessions in British India are governed by the *lex situs*, which is the personal law of the Muhammadans in British India. Under that law a Muhammadan can leave one-third of his estate as he likes, provided that he does not leave it to his heirs according to Muhammadan law. The testator did purport to leave property of his in British India to his heirs, namely, his widow and his surviving daughter. This was unlawful according to the *lex situs* and to this extent his will cannot stand.

As they are not heirs according to Muhammadan law the testator's bequest to the children of his deceased daughter is lawful, provided that they do not get more than one-third of the immovable property in British India. They cannot get more than one-third. After this legacy has been provided for, the widow will get one-eighth, Ayisa Bi one half and the plaintiffs three-eighths of the immovable property in British India. All property in Ceylon and the movable property abroad will be distributed according to the will. We may add that the gifts made by the testator during his lifetime and upheld by the trial Court have not been questioned in this Court.

The case will be remanded to the trial Court with directions to administer the estate in accordance with this judgment. We consider that the costs of all parties, both here and below, should be paid out of the estate.

V.P.S.

Case remanded.

[FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

Mukunda Murari Chakravarti and others .

.. Appellants*

v.

Pabitrarmoy Ghosh and others

.. Respondents.

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (IX of 1940), section 3 and Civil Procedure Code (1908), section 4 (1) and Order 21, rule 24—Validity of section 3 of the Bengal Act.

On a contention that section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, in so far as it directs that all proceedings for ejectment even in execution of decrees shall be stayed for a number of years, is repugnant to rule 24 of Order 21, Civil Procedure Code, which directs that the Court shall issue its process for the execution of the decree once the preliminary measures have been taken,

Held, that rule 24 of Order 21 must be read subject to section 4 (1) of the Code which saves any special power conferred by or under any other law for the time being in force and when it is so read, no question of repugnancy between the Civil Procedure Code and the impugned Act will arise.

Sardar Raghubir Singh, Advocate, Federal Court, instructed by Ganpat Rai, Agent, for Appellants.

S. N. Mukherjee, Advocate, Federal Court, instructed by P. K. Bose, Agent, for Respondents.

* Case No. 26 of 1943.

Sir Brojendra Mitter, Senior Advocate, Federal Court (*K. K. Raizada*, Advocate, Federal Court, with him), instructed by *B. Banerji*, Agent, for the Advocate-General of Bengal.

The Judgment of the Court was delivered by

The Chief Justice.—Some of the appellants and the predecessors-in-title of the other appellants obtained a decree in ejectment against the respondents, on the 8th February, 1940; and it was confirmed on appeal on the 15th May, 1940. When the decree-holders applied for execution of this decree, on the 4th June, 1940, the defendants filed an application asking for stay of proceedings in terms of section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (Bengal Act IX of 1940) which had come into force on the 30th May, 1940. The decree-holders contended that this Act was *ultra vires* and inoperative; but this contention was overruled by the lower Courts as well as by the High Court at Calcutta. Against this decision of the High Court this appeal has been preferred.

The reasons for the decision pronounced by the High Court in this case will be found in an earlier judgment of a Special Bench of that Court (*Shrimathi Sukumari Debi v. Rajdhari Pandey*¹). The operativeness of the Bengal Act which did not receive the consent of the Governor-General was impugned on the ground that some of its provisions (including section 3) were repugnant to the provisions of the Civil Procedure Code relating to execution of decrees and that to the extent of such repugnancy the Bengal Act was void under section 107 (1) of the Government of India Act. This contention was met by the High Court by two answers: (1) that the Bengal Act was covered by entries Nos. 2 and 21 of List II of the seventh schedule to the Constitution Act and that therefore section 107 had no application to the case; and (2) that even if, as contended, the Act should be held to fall under entry 4 of List III, its operation was saved by section 4 (1) of the Civil Procedure Code. Both these grounds have been challenged before us on behalf of the appellants. In the view we take on the second ground, it is unnecessary to express any opinion on the first.

Assuming that the impugned Act is legislation in respect of "civil procedure" (entry 4 in List III), section 107 (1) only enacts that the existing Indian law, viz., the Civil Procedure Code shall prevail as against the provincial legislation and that the provincial law shall be void to the extent to which any of its provisions are repugnant to any provisions of the Civil Procedure Code. It is contended on behalf of the appellants that section 3 of the impugned Act, in so far as it directs that all proceedings for ejectment even in execution of decrees shall be stayed for a number of years, is repugnant to Order 21, rule 24 of the Civil Procedure Code which directs that the Court shall issue its process for the execution of the decree once the prescribed preliminary measures have been taken. But this rule of the Code must be read subject to section 4 (1) which saves any special power conferred by or under any other law for the time being in force. When it is so read, no question of repugnancy between the Civil Procedure Code and the impugned Act will arise—see *Megh Raj v. Allah Rakhi*².

It was faintly argued that even on the terms of section 3 of the Bengal Act, the order of the Courts below was not justified, as the section is limited to proceedings against a "tenant" and a person against whom a decree in ejectment had been passed could no longer be spoken of as a tenant. As pointed out by the High Court it is clear from the tenor of the section that the word "tenant" is there used in the popular sense, that is of a person who was a tenant before the decree in ejectment was sought or obtained against him.

The appeal fails and is dismissed with costs.

G. R.

V. S.

Appeal dismissed.

1. I.L.R. (1942) 1 Cal. 497; 46 C.W.N. 174; 2. (1942) F.C.R. 53 at pp. 58-59; 5 F.L.J. 74 C.L.J. 485. 33.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Chittam Subbayya

... *Appellant**

v.

Muthyala Ramachandrappa and others

... *Respondents.*

Civil Procedure Code (V of 1908), section 35-A—Power to order compensatory costs against person instigating the suit and supporting the plaintiff.

The Court has, under section 35-A, Civil Procedure Code, wide powers to make an order for costs by way of compensation when a suit has been filed falsely or vexatiously and an objection to it on such grounds has been put forward at the earliest opportunity.

The section is wide enough to permit an order for costs being made against a person who had been the instigator of the suit, had supported the plaintiff in its conduct and was also a party to it.

Appeals against the decree of the District Court of Bellary in O. S. No. 46 of 1941.

V. S. Narasimhachar and N. Appu Rao for Appellant.

M. S. Ramachandra Rao and A. Bhujanga Rao for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—Appeal No. 237 of 1943 is against a decree passed by the District Judge of Bellary dismissing a suit filed under the provisions of Order 21, rule 63 of the Civil Procedure Code. C. M. A. Nos. 341 and 344 of 1943 are against an order for costs passed by the District Judge under the provisions of section 35-A, Civil Procedure Code.

In O. S. No. 22 of 1929 of the same Court the first defendant sued for partition of the estate of the joint family of which he was a member. The first defendant in that suit was his brother. He is the father of the second defendant in the present suit. A decree for partition was passed and it was made the subject of an appeal to this Court (Appeal No. 189 of 1937). The appeal was decided on the 6th August, 1938, and this Court directed that the father of the second defendant should pay personally to the first defendant a sum of Rs. 52,000 and that the second defendant and his brother should also be liable for the sum with the first defendant, but that their liability should be restricted to their shares in the family estate. The case was remanded to the District Court to pass a final decree in accordance with the judgment of this Court. The final decree was passed on the 14th September, 1939.

In O. S. No. 9 of 1938 of the Court of the Subordinate Judge of Bellary the second defendant obtained a money decree for some Rs. 10,000 against the third defendant. This decree was confirmed by this Court in appeal (Appeal No. 206 of 1939) on the 14th July, 1939. On the 14th October, 1939, the second defendant transferred this decree to the plaintiff.

In E. P. No. 87 of 1939 of the District Court of Bellary the first defendant applied for execution of the decree which he had obtained in O. S. No. 22 of 1929 by the attachment of the decree which the second defendant had obtained against the third defendant in O. S. No. 9 of 1938. The plaintiff as the transferee of that decree, objected. He had previously applied for an order recognising him as the holder of the decree. That application and his objections to the first defendant's prayer for execution were heard together. The District Judge dismissed the plaintiff's application to be brought on the record and also his petition in the execution proceedings by an order dated the 12th December, 1940. A. A. O. No. 356 of 1941 was filed by the plaintiff against the order of the District Judge refusing to recognise him as the transferee of the decree in O. S. No. 9 of 1938 and C. R. P. No. 1029 of 1941 for revision of the order overruling his objection to the execution petition filed in O. S. No. 22 of 1929. This Court allowed A. A. O. No. 356 of 1941, but rejected the Civil Revision Petition. By that time the plaintiff had filed the present suit.

* App. No. 237 of 1943 and A. A. O. Nos. 341 & 344 of 1943.

12th September, 1944.

The learned District Judge dismissed the plaintiff's suit because he was of the opinion that the transfer by the second defendant of his decree in O. S. No. 9 of 1938 to the plaintiff was a dishonest arrangement in order to defeat the claim of the first defendant. He considered that the plaintiff's suit was false and vexatious and that it had been filed at the instance of the second defendant. In these circumstances he directed the plaintiff and the second defendant to pay to the first defendant jointly a sum of Rs. 1,000 as compensatory costs under section 35-A of the Civil Procedure Code. Appeal No. 237 of 1943 and C. M. A. No. 341 of 1943 have been filed by the plaintiff, the former against the decree dismissing his suit and the latter against the order for costs passed under section 35-A. C. M. A. No. 344 of 1943 has been filed by the second defendant against this order for costs.

We consider that the evidence justifies the conclusion of the District Judge that the transfer to the plaintiff of the decree in O. S. No. 9 of 1938 was made for the purpose of defeating the decree obtained by the first defendant in O. S. No. 22 of 1929. The plaintiff is a close friend of the second defendant. The transfer to him of the decree was made a month after the first defendant had obtained the final decree in O. S. No. 22 of 1929. Although the second defendant had obtained a decree for a sum of Rs. 10,000 against the third defendant the consideration for the transfer is said to be Rs. 5,000, made up for the most part of moneys alleged to be due by the second defendant to the plaintiff under promissory notes. Only Rs. 120 was paid by the plaintiff to the second defendant in cash. In the course of his evidence the plaintiff explained that the consideration for the transfer was limited to Rs. 5,000 as there had been a dispute between the second defendant and his uncle Ramachandrappa. Why this should diminish the value of the decree is not explained. The plaintiff is not a man of wealth. He says he owns two houses worth Rs. 4,000 and that he has lent Rs. 2,000 or Rs. 3,000 to others, but there is only his word for this, and he did not impress the District Judge as being a man of substance.

There is a further and more important factor in the case. On the 1st March, 1939, the first defendant, as the decree-holder in O. S. No. 22 of 1929, applied to the District Court for a temporary injunction restraining the defendants in the suit from receiving or realising amounts due to them from debtors under decrees or other proceedings in Court or on documents or otherwise till the complete satisfaction of his decree. The first and the third defendants gave an undertaking that they would not collect debts belonging to them or to the family in the meantime. The second defendant was willing to give an undertaking that he would not collect debts belonging to the family but he refused to give an undertaking with regard to his own affairs. The District Judge did not regard this as being at all satisfactory and on the 23rd March, 1939, he passed an order directing the second defendant to deposit all his collections in Court, pending the final decree. Notwithstanding this order the second defendant transferred the decree to the plaintiff and for a sum equal to only half the amount of the decree. The District Judge considered that in making the transfer he was acting in the face of the order of the 23rd March, 1939. We consider that there is here ample material to support the finding of the District Judge that the transfer of the decree in O. S. No. 9 of 1938 to the plaintiff was not *bona fide* and was made with the object of defeating the decree obtained by the first defendant. This being so, Appeal No. 237 of 1943 must be dismissed with costs.

Section 35-A of the Civil Procedure Code permits a Court to make an order for costs by way of compensation when a suit has been filed falsely or vexatiously, and an objection to it on such grounds has been put forward at the earliest opportunity. In his written statement the first defendant averred that the transfer was a collusive arrangement between the plaintiff and the second defendant and specifically pleaded that the suit was malicious and vexatious. If the transfer of the decree in O. S. No. 9 of 1938 was not *bona fide*, but was entered into for the purpose of defeating the first defendant the suit was a false one and vexatious. The District Judge finds this to be the case, and in the circumstances he was fully justified in making the order against the plaintiff.

The real question is whether he had power under the section to make such an order for costs against the second defendant. The section empowers a Court to pass an order against the party by whom the false claim has been put forward. The second defendant did not file a written statement but he supported the plaintiff. In fact he gave evidence on his behalf. We have agreed with the finding of the District Judge that the transfer was made for an ulterior purpose. As the second defendant was behind the suit filed by the plaintiff and was a party to it we consider that section 35-A is sufficiently wide to bring him within it. Being the instigator of the suit, having supported the plaintiff in its conduct and being a party to it he comes within the words "by the party by whom such claim or defence has been put forward." We consider that the District Judge was right in making both the plaintiff and the second defendant, who was the real actor, responsible for these costs.

C. M. A. Nos. 341 and 344 of 1943 are dismissed with costs.

K.C.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

T. A. Janakumara Nainar

*Appellant**

v.

T. S. Samanthabadra Nainar

Respondent.

Deed—Construction—Indemnity to make good any loss arising in the realisation of moneys due under certain mortgage deeds and promissory notes—Passing of the Madras Agriculturists' Relief Act, 1938—Scaling down of amounts—Whether indemnity covers loss occasioned by the later change in law relating to debts—Kalan—Meaning of.

The defendant owed Rs. 11,859-5-0 to the plaintiff. In full satisfaction of the amount, he assigned to the plaintiff certain promissory notes and mortgages and also made a cash payment, aggregating in all Rs. 9,833, undertaking in each deed of assignment to indemnify the plaintiff against loss in realising the debts. When the plaintiff tried to realise the debts he got decrees only for amounts found due after scaling down the debts under Act IV of 1938. In a suit by him to recover the loss thereby occasioned to him,

Held, that the terms of the indemnity being absolute it would *prima facie* cover loss attributable even to a change of the law which the parties could not have foreseen, such as a law scaling down debts.

Subramaniam Chettiar v. Bacha Rowther, (1941) 2 M.L.J. 751, applied.

Held further, that there is no warrant either in principle or in precedent for the broad proposition that ordinarily a contract must be taken with reference to the law as existing at the time and that a term or condition should be implied that the obligation should cease if the law was subsequently altered so as to affect the rights of parties in a manner not contemplated by them; but that it is a question of construction in each case, regard being had to the language used, the nature of the contract and the surrounding circumstances.

Held also, that the term 'kalan' is a word of somewhat loose connotation and signifies 'dispute' rather than a defect in title, in the circumstances of the case.

Annathurai Aiyar v. Ramanujachariar, (1912) 22 M.L.J. 411, considered.

Appeals against the decree of the District Court, North Arcot, in O.S. No. 9 of 1942, dated 2nd November, 1942.

V. T. Rangaswami Aiyangar and K. Kalyanasundaram for Appellant in Appeal No. 95 of 1943 and for Respondent in Appeal No. 108 of 1943.

K. Rajah Aiyar and V. Seshadri for Respondent in Appeal No. 95 of 1943 and for Appellant in Appeal No. 108 of 1943.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal and cross-appeal arise out of a suit to enforce an indemnity bond. The plaintiff's claim having been partly allowed and partly disallowed both parties have preferred appeals.

Between 1926 and 1929 the defendant borrowed various sums of money on promissory notes from the plaintiff's father who died in February, 1930. In July, 1930, there was a settlement of account and a sum of Rs. 11,859-5-0 having been found to be due from the defendant the latter assigned to the plaintiff in full satisfaction of the debt ten promissory notes of the value of Rs. 4,182-15-0 and two mortgages of the value of Rs. 4,583-10-0 executed in his own favour by third parties, and paid Rs. 1,071-7-0 in cash aggregating in all to Rs. 9,838, the balance

* Appeals Nos. 95 and 108 of 1943.

being remitted by the plaintiff. The promissory notes were endorsed and delivered and for the mortgages which were of the years 1911 and 1929 two assignment deeds were executed on 3rd July, 1930. The principal and interest due under each mortgage up to the date of the assignment was calculated and specified in the deeds which were in similar terms, and the plaintiff was authorised to

"recover directly the above amount of principal and interest as well as the interest that will accrue hereafter according to the terms of the hypothecation deed".

And in each deed there was a stipulation that

"if in the matter of such recovery any dispute ('*kalan*') arises I shall make good (the loss)."

The defendant also executed on 5th July, 1930, a so-called "receipt" which was really in the nature of an indemnity bond. In this document, after reciting the settlement of account between the parties and the assignment of the promissory notes and mortgages in full satisfaction of the debt due to the plaintiff, the defendant stipulated as follows :

"I shall make good the loss if any dispute (*kalan*) should arise owing to the renewal of the said bonds or in realising the dues on the renewal of the said bonds. I agree to pay the costs of going to Court and the costs which might be ordered by the Court. I agree to make good the loss if any dispute (*kalan*) should arise in realising the amounts on the above mentioned deeds. I hold myself responsible until the cash in respect of assigned deeds and bonds is realised."

In 1935, the plaintiff sued in the Court of the District Munsiff, Ranipet, to enforce the mortgage of 1929 which was assigned to him for Rs. 1,409-12-0 and obtained a decree for Rs. 3,015. This decree was, however, scaled down to Rs. 1,165 on 26th October, 1938, at the instance of the mortgagor who claimed the benefit of the Madras Agriculturists' Relief Act, 1938. The plaintiff also brought O. S. No. 13 of 1937 in the Court of the Subordinate Judge of Vellore claiming Rs. 6,409-5-7 on foot of the other mortgage assigned to him for Rs. 3,173-14-0, but the said Act having come into force during the pendency of the suit and the mortgagor in this case too having claimed its benefit, a decree for Rs. 63-13-0 only was passed after scaling down the debt in accordance with the provisions of that Act. The plaintiff thereupon issued a notice of demand on 7th October, 1939, requiring the defendant to make good the loss by paying the difference between the amounts realised by him on the mortgages as aforesaid and the full amounts payable thereunder, and failing to obtain satisfaction of his claim instituted the present suit for recovery of the amount (Rs. 7,833-3-7) with interest at six per cent. per annum from the date of demand. The defendant pleaded, *inter alia*, that the covenants to indemnify the plaintiff contained in the deeds of assignment and the so-called receipt did not cover losses arising out of the operation of the Madras Agriculturists' Relief Act, 1938, as neither of the parties could have foreseen in 1930 the passing of such an Act by the Legislature, and that, in any event, the indemnity extended only to the sum of Rs. 4,583-10-0 the amounts due on the two mortgages on the date of assignment, *i.e.*, 3rd July, 1930, and not to the interest accruing due subsequent to that date. He also claimed such relief as he might be found entitled to under the Madras Agriculturists' Relief Act, 1938, as he was an agriculturist within the meaning of that Act. The Court below rejected the first plea but accepted the second and passed a decree for Rs. 4,583-10-0 with interest at $6\frac{1}{4}$ per cent. per annum less the amounts realised by the plaintiff on the mortgages, *i.e.*, for Rs. 4,176-1-1. From this decree the plaintiff has preferred Appeal No. 95 of 1943 claiming the balance of the amount sued for, and the defendant has preferred Appeal No. 108 of 1943 contending that the covenant for indemnity does not cover losses due to the new Act.

It is obvious that the two assignment deeds and the so-called receipt are parts of the same transaction and must be read together. There was some controversy as to the exact connotation of the Tamil word '*kalan*' so commonly used in conveyances in this part of the country. Mr. Rajah Ayyar for the plaintiff suggested that it signified a defect in title referring to *Aiyathurai Aiyar v. Ramanujachariar*¹ where the word was understood in that sense, and urged that the covenant contemplated only losses due to some invalidating fact such as fraud, want of due execution, absence of consideration, etc., vitiating the mortgages assigned. We are unable

to accept this restricted interpretation of the covenants. It is most unlikely that the parties, while foreseeing and guarding against such contingencies, would have failed to provide against the much more obvious and probable contingency of the debtors' default in payment. 'Kalan' is a word of somewhat loose connotation and its official translation as 'dispute' is supported by Winslow's Dictionary and would seem to fit the context best. In this sense the covenant must be taken to provide for indemnification of the plaintiff against loss arising out of any dispute raised by the debtors in the matter of realising the mortgage debts assigned to him by the defendant. The contract being thus absolute in terms, *prima facie*, should be taken to cover losses attributable even to a change of the law which the parties could not have foreseen at the time of the contract.

Mr. Rajah Ayyar, however, contended that people must ordinarily be taken to contract with reference to the law as existing at the time, and that a term or condition should be implied that the obligation should cease if the law was subsequently altered so as to affect the rights of parties in a manner not contemplated by them. On this principle, it was urged that, when the Madras Agriculturists' Relief Act was passed eight years later resulting in the scaling down of the debts assigned to the plaintiff, the debtors being agriculturists, the indemnity ceased to be operative. There is no warrant either in principle or in precedent, for the broad proposition contended for by the learned counsel. No doubt contracts absolute as to their terms have sometimes been construed as subject to implied conditions qualifying the obligation. In England, where there is no positive rule of law such as is enacted in section 56 of the Indian Contract Act declaring contracts void for supervening impossibility of performance, Courts have often implied a condition, as a matter of construction, that the contract, though absolute in terms, shall be discharged if its substratum or essential foundation disappears or performance becomes impossible. Many of the decisions cited in the course of the argument before us are only illustrations of cases where the Courts have implied or refused to imply such a condition in contracts absolute in terms (e.g., *Baily v. De Crespigny*,¹ *Newby v. Sharpe*,² *Walton Harvey, Ltd. v. Walker and Hemfrays, Ltd.*³). It is unnecessary to discuss these and other similar decisions to which we were referred as the rule of construction applicable in such cases has been recently expounded in the House of Lords. In *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*⁴, Lord Wright observed :

"It is true that a contract, absolute in terms, may be absolute also in effect. The contractor if he cannot perform, must pay damages. *Prima facie*, the actual language governs. But a contract absolute in terms is not necessarily absolute in effect; . . . It is a question of the construction of the particular contract whether the obligation is absolute or whether it is qualified. It will thus be seen that the Court is not claiming to exercise a dispensing power, or to modify or alter contracts. The parties did not express the qualification because they did not think of the possibility of the occurrence, but as Lord Watson said in *Dahl v. Nelson Donkin & Co.*⁵ 'when one or other of these possibilities becomes a fact the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it) but that which the parties as fair and reasonable men would presumably have agreed upon, if having such possibility in view they had made express provision as to their several rights and liabilities in the event of its occurrence.' In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the Court has to decide, not what the parties actually intended, but what as reasonable men they should have intended. The Court personifies for this purpose the reasonable man."

It will be seen that this statement of the law affords no support to the broad contention of Mr. Rajah Ayyar that a change in the law affecting the rights of parties makes a contract unenforceable in virtue of an implied term to that effect. It is a question of construction in each case regard being had to the language used, the nature of the contract and the surrounding circumstances.

The question then is whether the defendant is absolved from his liability to indemnify the plaintiff by reason of the enactment of the Madras Agriculturists' Relief Act, 1938, in the circumstances of this case. As has been stated, the contract is absolute in terms. The new Act does not prohibit the payment of debts due by agriculturists. It only confers on them certain benefits by providing for a scaling

1. (1869) 4 Q.B.D. 180.

2. (1877) 3 Ch. D. 39.

3. (1931) Ch. 274.

4. (1942) A.C. 154 at 184.

5. (1881) 6 A.C. 38 at 59.

down of their debts. There is no question of the mortgagors' covenant to pay or the defendant's covenant to indemnify having been rendered impossible of performance. And what are the surrounding circumstances? On the date of the contract, the defendant owed Rs. 11,854 to the plaintiff, and, being unable to pay the amount in cash, he assigned to the plaintiff certain promissory notes and mortgages of lesser value (Rs. 9,833) in full satisfaction, undertaking to indemnify the plaintiff against loss in realising the debts. In that situation, if the possibility of a law scaling down these debts had occurred to the parties, would they "as fair and reasonable men" have agreed that the obligation to indemnify should be at an end? We think not. Indeed, to imply such a term would be inconsistent with the intention of the parties and defeat the very object of the settlement arrived at. We may refer, in this connection, to the decision of this Court in *Subramaniam Chettiar v. Bacha Rowther*¹, where it was held that the obligation of a surety was not affected (except, of course, if so far as he is himself an agriculturist) by the principal debtor obtaining relief under the Act, though the point now raised was not argued in that case.

The question next arises as to what sum the defendant is liable to pay under the covenant for indemnity. We are unable to agree with the learned District Judge's conclusion on this point. The learned Judge assumed that the loss to the plaintiff arose on the date of the assignment itself, i.e., 3rd July, 1930, and finding that the defendant was an agriculturist, within the meaning of the new Act, proceeded to scale down the liability by disallowing all interest on the amount of the loss till the 1st October, 1937. This is clearly wrong as the plaintiff's loss arose only when the mortgage debts were scaled down, i.e., on 31st August, 1938, and 26th October, 1938, respectively; any such loss was, plainly, the difference between the full amounts payable under the bonds and the amounts actually realised by the plaintiff, i.e., Rs. 7,833-3-7 the sum claimed in the suit. The only relief which the defendant could claim as an agriculturist under the Act is in respect of interest for the period subsequent to the dates aforementioned, but the plaintiff has claimed interest only from the date of his demand, viz., 7th October, 1939, and that at six per cent. per annum which is less than the statutory rate. No question, therefore, arises of awarding relief to the defendant as an agriculturist. We may notice here, in order to reject a suggestion, founded on the last clause in the so-called "receipt" quoted above, that the transaction was only a contract of guarantee and that the liability of the defendant as a surety having arisen on 3rd July, 1930, all subsequent interest on the amounts due in respect of the mortgages as on that date should be wiped out under the new Act as he has been found to be an agriculturist. No such suggestion was made in the Court below, and whatever may be the legal effect of the clause relied upon if it had stood alone, we are satisfied that the document read as a whole and with the covenants in the assignment deeds is clearly a contract of indemnity and must receive effect accordingly.

In the result, A. S. No. 95 of 1943 is allowed and the plaintiff will have a decree as prayed for with costs throughout. Appeal No. 108 of 1943 is dismissed with costs. One advocate's fee in both appeals.

K.C.

Appeal No. 95 of 1943 allowed and
Appeal No. 108 of 1943 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE BELL.

M. G. Natesa Chettiar

.. Appellant*

v.

S. Subbunarayana Ayyar and others

.. Respondents.

Transfer of Property Act (IV of 1882), section 52—Lis pendens—Applicability to involuntary sale in enforcement of a mortgage—No specific provision in Civil Procedure Code compelling mortgagee to implead prior charge-holders in execution proceedings—Mortgagee having knowledge of sale in favour of defendants in enforcement of their charge—Mortgagee not entitled to claim any equitable relief.

1. (1941) 2 M.L.J. 751.

* A. A.Os. Nos. 420 and 458 of 1943.

15th August, 1944.

The inamdars of a certain village (defendants) whose right consisted in receiving every year from the mittadar (owner of the melwaram right) $\frac{1}{3}$ of the sum payable by the mittadar to the Government as peshcush, to which right was attached a first charge on the mittadar's interest in the village, sued the mittadar for arrears of this payment of the $\frac{1}{3}$ and for the enforcement of their charge, obtained a decree, brought the mittadar's property to sale and obtained delivery in execution of their decree in December, 1934. The plaintiff, a mortgagee of the mittadar's rights was not impleaded in that suit, and he filed a suit on his mortgage against the mittadar after the institution of the suit by the defendants against the mittadar, but before they obtained a decree. The plaintiff obtained a decree, sold the mortgagor's property and the sale was confirmed in March, 1936. Neither in the suit nor in execution proceedings were the defendants made parties. When the plaintiff sought to obtain delivery he was obstructed by the defendants and an application to remove the obstruction was dismissed. The plaintiff then filed the suit against the defendants for setting aside the adverse order. It was dismissed by the District Munsiff and the lower appellate Court among other things held that if the defendants did not pay the plaintiff the proportionate amount due to him on his decree, the property should be sold and the sale proceeds should be distributed in a particular manner and if the defendants paid, their possession should not be disturbed; and that the defendants must give credit for the income received by them from the village while they were in possession of it. On appeal to the High Court,

Held, that the doctrine of *lis pendens* does not cover the case of an involuntary alienation in execution of a mortgage decree, but applies only to the creation of the mortgage itself and the plaintiff cannot therefore rely upon that doctrine.

Held further, that since each of the parties in the circumstances of the case relied upon an imperfect title, it was not open to the plaintiff to claim an equitable relief inasmuch as, despite the absence of any provision in the Civil Procedure Code compelling him to implead the defendants, he ought to have made the defendants parties as he must have had full knowledge of the sale in favour of the defendants.

Chinnaswami Padayachi v. Dharmalinga Padayachi, (1932) 63 M.L.J. 394, followed; *Ram Sanahilal v. Janki Prasad*, (1931) I.L.R. 53 All. 1023 (F.B.) not followed.

Held also, that the defendants were liable to account for the income received.

Natesa Chettiar v. Ramalinga Chettiar, (1937) 46 L.W. 332, followed.

Appeals against the order of the Court of the Subordinate Judge of Salem dated 12th January, 1935, and made in A. S. No. 185 of 1942, preferred against the decree of the Court of the District Munsiff of Dharmapuri, in O. S. No. 33 of 1940.

A. Bhujanga Rao and D. R. Krishna Rao for Appellant in A. A. O. No. 420 of 1943 and Respondent in A. A. O. No. 458 of 1943.

T. R. Arunachala Aiyar and P. S. Raghavarama Sastri for Respondent in A. A. O. No. 420 of 1943 and Appellant in A. A. O. No. 458 of 1943.

The Judgment of the Court was delivered by

King, J.—These appeals are concerned with a village in the Salem district called Chettihalli. The mittadar, or owner of the melwaram right in this village was one Ramakrishna Chettiar (to be referred to hereinafter as the mortgagor). He mortgaged his rights in this and other villages to the plaintiff in O. S. No. 33 of 1940, District Munsiff's Court, Dharmapuri, from which the present appeals have arisen. This was so long ago as 1921, 1922 and 1923, and was effected by three mortgage deeds. Defendants 1 to 3 in O. S. No. 33 of 1940 are inamdars of Chettihalli whose right consisted in receiving every year from the mittadar one-third of the sum payable by the mittadar to Government as peshcush. Attached to this right is a first charge on the mittadar's interests in the village.

On 30th June, 1933, the defendants sued the mortgagor for arrears of this payment of one-third of the peshkush, and for the enforcement of their charge. They obtained a decree on 10th April, 1934, brought the mortgagor's property to sale on 24th October, 1934, and obtained delivery in execution of their decree on 4th December, 1934. To this suit the plaintiff, who, by virtue of defendant's prior charge, may now be called the puisne mortgagee, was not made a party.

On 12th October, 1933, plaintiff sued the mortgagor on the three mortgages. He obtained a decree on 25th July, 1934, sold the mortgagor's property on 3rd October, 1935, and obtained confirmation of his sale on 6th March, 1936. In this suit plaintiff did not implead the defendants. Plaintiff next sought to obtain delivery of the property which he had purchased. Defendants naturally obstructed him. An application by plaintiff to remove the obstruction was dismissed on 18th August, 1938. The result was the present suit by plaintiff filed in August, 1939, though now numbered as O. S. No. 33 of 1940, to set aside the adverse order.

The suit was dismissed by the learned District Munsiff of Dharmapuri. Plaintiff's appeal against this decree dismissing his suit was heard by the learned Subordinate Judge of Salem who on the 12th January, 1943, passed an order of remand against which both parties have now appealed.

The learned Subordinate Judge's findings were these :

- (i) Plaintiff must pay to defendants the amount due on their decree.
- (ii) In calculating this amount plaintiff will have to pay interest, but defendants must give credit for income received by them from the village while they were in possession of it.
- (iii) Defendants must pay to plaintiff the proportionate amount due to him on his decree for this particular village.
- (iv) These sums will be set off one against the other, and the exact amount thus found to be due by the defendants will be declared.
- (v) If defendants do not pay, the property will be sold, and directions are given for the distribution of the sale proceeds. (It follows from this that if defendants do pay, their possession will not be disturbed, and their ownership will be recognised).
- (vi) The suit was remanded for an enquiry into the precise amount thus to be declared payable by the defendants, and for the passing of a decree on the lines indicated by the learned Subordinate Judge.

Both parties have appealed from this order of remand. The principal appeal is that of the plaintiff (A. A. O. No. 420). He contends that he has the better title to the property concerned, and that defendants have no right to redeem him. Defendants in C. M. A. No. 458 contend that plaintiff cannot redeem them, so that their title is unassailable and plaintiff's suit should be forthwith dismissed. There was also a contention (not however, formulated in the grounds of appeal) that defendants need not give credit for the income which they had received.

Plaintiff's case regarding the superiority of his own title was put very simply as follows, and depends on the provisions of Order 34, Civil Procedure Code. Defendants ought to have impleaded him in their suit of 1933 (see rule 1 of that order) and not having done so the decree which they obtained cannot be binding upon him. Plaintiff on the other hand, was not bound to implead the defendants in his suit (see the same rule). Plaintiff filed his suit in October, 1933; defendants acquired no rights to the equity of redemption until October, 1934. When the case is put in this simple manner, there can be no doubt that plaintiff is right in contrasting his own correct procedure with the incorrect procedure of the defendants, but it does not in our opinion necessarily follow that plaintiff's title, as subsequent purchaser in his own suit must prevail over defendants' title as purchasers in theirs. It is only if the doctrine of *lis pendens* can be successfully applied to this case that plaintiff can claim that his decree binds the defendants, who were not in fact parties to his suit.

Plaintiff in contending that the doctrine of *lis pendens* can be extended to the present case relies on a Full Bench ruling of the Allahabad High Court in *Ram Sanahilal v. Janki Prasad*¹. In Madras however, the extension of the doctrine to cover the case of an involuntary alienation in execution of a mortgage decree has been refused, see *Chinnaswami Padayachi v. Dharmalinga Padayachi*². The transfer to which the provisions of section 52 of the Transfer of Property Act can properly be applied is the creation of the mortgage itself, not the subsequent sale in the enforcement of the mortgage. It may be that, as argued for the plaintiff, the enunciation of this legal principle in *Chinnaswami Padayachi v. Dharmalinga Padayachi*² was *obiter dictum*, but with respect, we do not consider the principle any the less sound on that account and we prefer to follow it rather than the contrary view as expressed in Allahabad.

We thus reach the position in which each party relies upon a title which is imperfect in that it does not bind the other. In these circumstances are there any grounds for preferring the plaintiff's? So far as priority of time in the acquisition of the title is concerned it is the defendants and not he who can claim the advantage. Plaintiff contends that in equity he should be preferred, again stressing the correctness of his procedure in filing his suit. But we see no particular meritorious behaviour

1. (1939) I.L.R. 53 All. 1023 (F.B.).

2. (1932) 63 M.L.J. 394.

in plaintiff when we look at the history of this case as a whole. He was of course within his rights in filing his suit without impleading the defendants, but, although no specific provision of the Civil Procedure Code compelled him to implead the defendants in taking his proceedings in execution in 1935 and 1936, he ought in our opinion to have done so. There can be no serious doubt that plaintiff must have become aware of the sale in October, 1934, by which defendants acquired their title. Certainly no facts were put forward in appeal in support of any plea of ignorance, and naturally plaintiff would always be greatly interested in the payment by his mortgagor of his annual dues to the defendants. We are of opinion therefore that the refusal to implead the defendants in the execution proceedings was deliberate and that plaintiff can claim no equitable relief. His appeal must be dismissed with costs.

The defendants have not seriously pressed their appeal. They succeeded in persuading the first Court that no redemption is possible of a decree like theirs based upon a charge given for annual payments, but did not repeat this attempt before the learned Subordinate Judge or before us. The claim that they are not liable to account for income received is negatived by *Natesan Chettiar v. Ramalinga Chettiar*¹. Their appeal also fails and is dismissed with costs.

V.P.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Minor Bhaskaran by adoptive mother and next friend Narayani Ammal. *Appellant.**

v.

Dhanammal (deceased) and others

Respondents.

Lunacy Act (IV of 1912), section 79—Leave to sue manager or his legal representative for accounts—Considerations justifying—Suit against a surety and for assignment of the surety bond—Proper course to be followed by Courts.

Though, under section 79 of the Lunacy Act, leave of the Court appointing the manager under the Act has to be obtained before any suit for accounts could be filed against such manager or his legal representatives no such sanction seems to be necessary to sue a surety who has executed a security bond along with the manager. Nor is there any express provision in the Act for the assignment of the security bond as in cases under the Guardians and Wards Act. If there are sufficient circumstances to indicate that some amount is likely to be due from the manager of the estate, the proper course would be to assign the security bond even before the suit is filed if there be a *prima facie* case, for it would be necessary and desirable to have the matter decided in the presence of the sureties and the manager or his legal representatives as to whether any amount had become payable from the manager to the estate of the lunatic.

Where there are a very large number of items of expenditure which are questioned and there may also be necessity for enquiring into the amount of profits likely to have been realised from the estate, it is not a matter that could be enquired into conveniently by the District Judge and leave should be granted to file a suit for accounts against the manager or his legal representatives as the case may be.

Appeal against the orders of the District Court, Trichinopoly, dated 9th November, 1940 and made in I. A. Nos. 420 and 158 of 1938, respectively in O. P. No. 94 of 1929.

K. S. Champakesa Aiyangar, R. Venkatachari and K. C. Srinivasan for Appellant.

K. S. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—These appeals are against the orders passed by the learned District Judge of Trichinopoly dismissing I. A. No. 420 of 1938 and 158 of 1938 filed by the appellant in these appeals. The appellant (petitioner) is the heir of his step-mother, the late Alamelu Ammal, the widow of one Gopalaswami Naidu, who was declared a lunatic and for whom one Govindammal was appointed as guardian and manager of the person and property in O. P. No. 94 of 1929 on the file of the District Court, Trichinopoly. Certain nanja and punja lands and a house had been devised to her by her father. Her husband died, and there was, as it were, a scramble for the possession of the properties allotted to her, with the result that

¹. (1937) 46 L.W. 332.

* A. A. O. Nos. 425 and 426 of 1941.

one Rangaswami Naidu as next friend of Alamelu Ammal filed a suit, O. S. No. 193 of 1929 in respect of the properties. He it was that filed O. P. No. 94 of 1929 also. It was ultimately ordered and Govindammal was appointed manager and guardian. The matter was taken to this Court in appeal which was dismissed, *vide* A. A. O. No. 504 of 1929. Govindammal obtained possession of these properties and was in enjoyment of the same till the death of Alamelu Ammal. She continued to be in possession after the death of the lunatic also. The present appellant claimed to be the heir of Alamelu Ammal and sought to have the properties delivered over to him. He claimed to be the step-son of Alamelu Ammal. He was directed to a suit and he filed a suit and obtained a decree declaring that he was the heir of Alamelu Ammal entitled to inherit her properties. That was O. S. No. 781 of 1933 on the file of the District Munsiff's Court of Trichinopoly. The litigation was taken up to this Court in S. A. No. 435 of 1938, and he was recognised as heir entitled to recover the properties of Alamelu Ammal. The properties were delivered over to him. He then filed these two petitions out of which these two appeals arise, praying in I. A. No. 158 of 1938 filed under sections 77 and 79 of the Indian Lunacy Act to take an account of the amount payable by the guardian Govindammal and to direct the respondents who had executed a security bond as sureties along with the manager Govindammal to pay the amount which, according to the appellant, came to Rs. 2,761-13-6. It is the petitioner's case that a scrutiny of the accounts submitted by Govindammal would reveal that various items of receipt had not been given credit to and various false and inadmissible items of expenditure had been included in the accounts. Two lists of the various amounts claimed under the two heads were also filed. A Commissioner was appointed to go through the accounts and submit a report. The Commissioner reported that the appellant failed to appear before him during some of the hearings and he therefore submitted a report after hearing only the respondents. The learned Judge, observing that he had carefully perused the report and stating that in applications of this kind the petitioner must make out a *prima facie* case before asking for an assignment of the security bond and that the petitioner had failed to make out such a case, dismissed that petition. During the pendency of that application, the appellant filed I. A. No. 420 of 1938 under section 79 of the Indian Lunacy Act praying that the Court may be pleased to grant leave to the petitioner to sue the legal representative of the manager and the sureties for an account of the management of the estate of the lunatic and to assign the security bond executed by the sureties in favour of the petitioner to enable him to collect the amount that may be found due. That petition was also dismissed. It is as against the orders on both these petitions that these appeals have been filed.

It is not disputed that the appellant is the heir of the deceased Alamelu Ammal entitled to succeed to her estate. There was a decree in favour of the appellant, the matter was taken to this Court and that decree has been confirmed. If, therefore, money is due by the manager of the lunatic's estate to the estate of Alamelu Ammal the appellant will be entitled to recover it. Govindammal the manager is dead, and it is as against the sureties who executed the surety bond along with her and the heirs of Govindammal that these petitions have been filed. Under section 79 of the Lunacy Act,

"Any relative of a lunatic may with the leave of the District Court sue for an account from any manager appointed under this chapter, or from any such person after his removal from his office or trust, or from his legal representative in case of his death, in respect of any estate then or formerly under his care or management or of any sums of money or other property received by him on account of such estate."

Under this section, leave of the Court appointing the manager under the Lunacy Act has to be obtained before any such suit could be filed, and that was why I. A. No. 420 of 1938 was filed. To sue a surety it does not appear that any such sanction is necessary and there is also no express provision in the Act for an assignment of the security bond. Such bonds are executed to the Courts and when the surety bonds are obtained, they are intended to be enforced if any money should become payable by the manager. If any such money become payable by the manager a suit will have to be filed for enforcing the bond either by the Court or by a party.

to whom the Court might assign the bond. It is true there is no provision in the Act for assigning the bond as in cases under the Guardians and Wards Act. But, then, since the bond was executed with a view to be enforced and one of the ways of enforcement is by assigning the bond to the person entitled to recover the amount, the proper course would be to assign the bond to the heir of the lunatic. If there are sufficient circumstances to indicate that some amount is likely to be due from the manager or the estate, the proper course would be to assign the bond even before the suit is filed if there be a *prima facie* case, for it would be necessary to have the matter decided in the presence of the sureties as to whether any amount had become payable from the manager to the estate of the lunatic. Therefore, the only other point for consideration is whether any *prima facie* case has been made out that any amount is owing to the estate of the lunatic from the manager.

All that the learned District Judge says is that he had read the Commissioner's report and that there were no materials before him to show that a *prima facie* case had been made out. As already stated above, the suit to recover possession of the properties was filed by one Rangaswami Naidu as next friend (O. S. No. 193 of 1929) and it was that Rangaswami Naidu that filed the petition, O. P. No. 94 of 1929, and it was he that was a party to the proceedings in this Court on appeal. In that account submitted by the manager, Govindammal, she had included various amounts said to have been expended both in Court and out of Court by Rangaswami Naidu in connection with those proceedings, some of which were incurred before Govindammal was appointed as manager. I find in a verified petition filed by Govindammal on 7th December, 1931, in O. P. No. 94 of 1929 stating that she considered the interest of Rangaswami Naidu and herself as being identical and that whatever expenses were incurred in the matter of the conduct of the proceedings in the suit and the proceedings under the Lunacy Act may be taken as "having been, nonetheless, incurred by Govindammal," and very large amounts were claimed as due to Govindammal the manager, because it was expended by Rangaswami Naidu. But it does not appear that any orders had been passed by the District Judge recognising these amounts as amounts in respect of which credit was to be given to the manager, although the amount was not spent by her but by Rangaswami Naidu. That is one of the main points to be considered. Several amounts had been shown as having been paid over in connection with amin's warrants, etc., for going to Court, engaging motor cars, taking sureties to Court, etc. It does not appear that any orders of the Court were obtained for expending such amounts. Further, they are not amounts spent by Govindammal but by Rangaswami. Rangaswami might have a claim and without that claim being recognised, how far Govindammal as manager will be entitled to treat them as amounts due to her merely because Rangaswami said he would not claim them against the estate and that it would be enough if they were given to Govindammal is a matter which has not been considered by the District Judge.

In these circumstances, I set aside the orders of the District Judge on both the petitions and instead give permission to the petitioner to file a suit for ascertaining the amounts due by Govindammal to the estate of Alamelu to which the petitioner has succeeded, as it is not a matter that could be enquired into conveniently by the District Judge as there are a very large number of items of expenditure which are questioned and as there may also be necessity for enquiring into the amount of profits likely to have been realised from the estate. The District Judge will also assign over to the petitioner the security bond executed in O. P. No. 94 of 1929 to enable him to realise the amount from the sureties in case it should be found that any amount is due. It will be more convenient if the claim is investigated in the presence of not only the legal representatives of Govindammal but also of the sureties, and unless the bond is assigned now, it would not be possible for the petitioner to file a suit against them also in case any amount should be found to be due.

The respondents will pay the petitioner the costs of these appeals, one set of advocate's fee.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Vangaveti Narayana and another

.. Petitioners*

v.

Madar Khan

.. Respondent.

Indian Penal Code (XLV of 1860), section 447—Criminal trespass—Gist of offence—Intent to annoy, insult or intimidate—Absence of person intended to be insulted or intimidated—Effect.

Where the object of a ryots' association was to take possession of lands in the possession of the zamindar in a high-handed manner, a trespass by members of the association for that purpose on the zamindar's lands must be deemed to have been with intent to annoy and insult the zamindar and the mere fact that he was not present would not indicate that there could have been no intent to annoy or insult. A man need not necessarily be insulted only by acts done in his presence.

Chinna Venkatesu v. Kesamma, (1931) 60 M.L.J. 336 : I.L.R. 54 Mad. 515, relied on.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Bezwada, dated 23rd December, 1942, and passed in C. A. No. 59 of 1942, preferred against the judgment of the Court of the Sub-Magistrate, Jaggayyapeta, dated 28th September, 1942, 7th April, 1943 and passed in C. C. No. 13 of 1942 and M. C. No. 3 of 1942.

V. Rangachari for Petitioners.

P. Satyanarayana Rao for Respondent.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Court made the following

ORDER.—Both these arise out of the same case, C. C. No. 13 of 1942 on the file of the Sub-Magistrate of Jaggayapeta. The charge against the petitioners who were accused 1 and 2 in the case was that they committed criminal trespass over 62 acres and 57 cents of land in S. No. 26 in T. D. No. 232 in Sripuram village in the possession of the zamindar of Munagala on 26th July, 1941, at about 7 A.M. When the complainant, an estate servant, obstructed the accused from ploughing the land, they threatened to cause personal injuries if he interfered. They were charged with offences punishable under sections 352 and 447; but they were acquitted in respect of the offence punishable under section 352 and convicted only for criminal trespass. The matter was taken in appeal to the Sub-Divisional Magistrate of Bezwada who confirmed the conviction and sentence. On 16th October, 1942, the Sub-Magistrate of Jaggayapeta passed an order directing the delivery of land trespassed to the zamindar of Munagala. During the pendency of the appeal, the proceedings were stayed and after the appeal was disposed of and the stay was vacated, an order was passed on 7th April, 1943, directing the delivery of possession of the lands as per the original order. Crl. R. C. No. 443 of 1943 is against the order of the appellate Magistrate confirming the conviction and sentence while Crl. R. C. No. 722 of 1943 is for revising the order of the Sub-Magistrate dated 7th April, 1943, directing the delivery of possession of lands to the zamindar.

The property in dispute measuring 62 acres and 57 cents in extent was the subject-matter of a litigation between the Government, an inamdar and the zamindar of Munagala. At the time of the survey, the entire survey field No. 26 measuring 73 acres 18 cents. was surveyed as if it was an inam land, but the registered extent of the inam was only 10 acres 61 cents. So a suit was filed for the establishment of the zamindar's rights both in the melwaram and kudiwaram in the 62 acres 57 cents excluding the ten acres 61 cents which alone was inam and for recovery of possession of the same. There was also an alternative prayer that in case the defendants should be considered to have acquired a kudiwaram right in the land, for the establishment of the plaintiff's melwaram right and for an injunction restraining the defendants from interfering with the said melwaram right of the plaintiff. The Government represented by the Secretary of State

* Crl. R. C. Nos. 443 and 722 of 1943.

for India in Council was defendant 1 in the suit. There were five other defendants. The suit was decreed in respect of both the melwaram and kudivaram rights and a decree in ejectment in respect of 62 acres 57 cents was passed; *vide* Ex. A. That was on 8th May, 1935. Proceedings in execution were taken and the property was delivered through Court to the zamindar on 15th June, 1939; *vide* Ex. C. On that date, the amin went to the village, marked off the 62 acres 57 cents as shown in a plan attached to the delivery receipt and delivered possession of that land to the agent of the zamindar after removing it from the possession of the defendants. The prosecution case was that after that the land was lying fallow. There were disputes between the ryots and the zamindar. The ryots' association, wanted the ryots to take possession of the lands which were not actually occupied by the zamindar. In pursuance of this programme of the association in dispute these lands were taken possession of by the accused on 26th July, 1941. There were originally seven accused in this case. Of them accused 1 and 2 are brothers and were the active members of the ryots' association. The other accused were their farm servants. They were acquitted and accused 1 and 2 alone were convicted and sentenced as stated above. P. W. 1, an estate clerk and P. W. 6 who took possession of the land on behalf of the estate were examined to prove that the zamindar of Munagala obtained a decree and also possession of the property in dispute through Court. P. W. 2 the kotwal of Sripuram village and a servant of the zamindar, was the complainant and he stated that when he found the accused attempting to plough the land he obstructed them. He was necked out by accused 3 at the instigation of accused 1 and the others abused him in foul language. He reported the matter to the estate authorities and again went to the land with some others. He found the accused actually ploughing it. They refused to heed their words when they were asked to give up ploughing the land and get away. The Village Munsiff, P. W. 3, and P. W. 4 who went with P. W. 2, corroborated his version. The accused's version was that they have been in possession of the land prior to the date of offence and denied the trespass. They attempted to show that the entire 73 acres 18 cents had belonged to the inamdar in various shares. The first accused's case was that he purchased the share of one Krishnamacharyulu under Ex. 8 and that even prior to the same he was in possession as a lessee. Both the Courts found that the alleged prior possession of the accused was not true and they committed trespass into the land and found them guilty of trespass.

It is urged before me that it is not all trespass that would amount to criminal trespass and that there is nothing in this case to indicate that the trespass was caused with the intent to annoy, intimidate or insult the zamindar. The prosecution case was that the petitioners were members of the ryots' association and it was with a view to annoy, intimidate and insult the zamindar that all lands not cultivated and in possession of the zamindar were sought to be trespassed upon by the ryots and that is how the appellants came to trespass upon this land. Both the Courts have found that the appellants entered into the land with intent to annoy, intimidate and insult the zamindar who was in possession of the land. I do not think there are any grounds for differing from the findings of the two Courts that the zamindar was in possession of the lands from the date of the delivery on 8th June, 1939 and prior to the date of occurrence and that the petitioners trespassed upon them. The version that they were in possession before the date of offence is not one that could be accepted. Krishnamacharyulu through whom the accused 1 in this case claims a right to the property was a party to the suit O. S. No. 659 of 1934 on the file of the District Munsiff's Court of Bezwada. That suit was not only in respect of the melwaram right but also in respect of the kudiwaram right and Krishnamacharyulu was defendant 4 in that suit and a decree in ejectment was passed. Exhibit C shows that there was a delivery of possession on 8th June, 1939. Exhibit 8, a sale deed to accused 1, is dated 13th June, 1941, a few days prior to the alleged date of occurrence. Exhibit 9, the cultivation account, no doubt shows that there were crops of ground nuts, sajja and anumulu in July and

jonna in October on that land. But then if the trespass was at the end of July and it is stated by the prosecution that the petitioners cultivated the land after ploughing it on 26th July, there was nothing wrong in the karnam describing the land as having been cultivated in July. The karnam's evidence on this point that he inspected the land on 15th July, was not believed by the two Courts and I see no reason to differ from those findings.

It is next urged that P. W. 2 in cross-examination stated that a major portion of the land was ploughed when he went near the field. From this it was sought to be inferred that it would not have been possible to have ploughed a major portion of the 62 acres odd on the morning of the date of occurrence itself. But then it was elicited in re-examination that the accused ploughed about 4 acres and if in cross-examination by a major portion of land was meant the 4 acres that was ploughed it must have been possible to plough a major portion of the 4 acres on the morning of the date of occurrence as the evidence itself was to the effect that it was not one team but three teams that entered the land to plough.

It is urged for the petitioners on the strength of the observations in *Vellappa v. Bheemarao*¹ and in the matter of *Govind Prasad*², that the prosecution will have to prove definitely that there was an intention to insult or annoy the zamindar. It was further stated that the zamindar was not present then and there could have been no intention to annoy him. But as pointed out in *Chinna Venkatesu v. Kesamma*³ an offence of criminal trespass could be committed even when the person in possession of the property is absent provided the entering into or upon the property was done with intent to annoy or intimidate. In this case there is evidence that the appellants were active members of the ryots' association; *vide* the evidence of P. W. 1. There was an agitation by the association to high-handedly take possession of the land which was the subject-matter of the case and also other similar lands when this offence was committed. P. W. 1 stated that this offence was committed under the advice of the leaders of the ryots' association. It is therefore clear that when the object of the association was to take possession of the lands in possession of the zamindar in a high-handed manner, the trespass must have been with intent to annoy and insult him and the mere fact that he was not present would not indicate that there could have been no intent to annoy or insult. A man need not necessarily be insulted by acts done in his presence. I therefore find that the petitioners were rightly convicted. The sentence of a fine of Rs. 30 cannot at all be said to be excessive. Cr. R. C. No. 443 of 1943 is accordingly dismissed.

With regard to the other petition namely Cr. R. C. No. 722 of 1943 it is said that under sec. 522, Criminal Procedure Code, the order must be passed within one month. The judgment in the case convicting the accused was delivered on 28th September, 1942, by the Sub-Magistrate of Jaggayapeta. Since the order sought to be revised was passed on 7th April, 1943, it is stated that this is invalid. Further it is contended that the order directing the delivery to the zamindar and not to the complainant was invalid. The order directing delivery, was, first passed on 16th October, 1942, within one month from the date of the conviction; but the execution of that order was stayed under the orders of the appellate Court and it was only after the appellate Court dismissed the appeal and the stay order was vacated the order could be executed and that is how the second order came to be passed on 7th April, 1943. The order dated 7th April, 1943, is not the order passed under section 522 of the Code. That order was passed on 16th October, 1942, itself. Only it was given effect to later, since till then there was a stay by the appellate Court. The next contention is that the delivery should not have been ordered to be made to the zamindar since he was not the complainant. But then the complainant was the kotwal, the agent of the zamindar and the finding was that the zamindar was dispossessed of the land by show of force. In these circumstances the order was rightly made. Cr. R. C. No. 722 of 1943 is also dismissed.

K. S.

Petitions dismissed.

1. (1918) 33 M.L.J. 729 : I.L.R. 41 Mad. 156 (F.B.). 2. (1878) I.L.R. 2 All. 465.
3. (1931) 60 M.L.J. 336 : I.L.R. 54 Mad. 515.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING AND MR. JUSTICE BELL.

D.: R. G. Rajan and another Petitioners*

v.

N. Srinivasa Naidu, as trustee of Sri Venkataramanaswami Chatram
Charity, Enangudi and others Respondents.*Court-Fees Act (VII of 1870), section 35—(Madras) Notification of 17th May 1943 (G. O. No. 5791), reducing court-fee chargeable in a suit for possession or joint possession between trustees or by trustees against ex-trustees—Not applicable to suit between rival claimants to trusteeship.*

A suit by plaintiffs claiming to be the trustees of certain trust property against the defendants who put forward the same claim, though in a sense a "suit between trustees", does not come within the scope of the notification (Madras Government, G. O. No. 5791, dated 17th May, 1943) reducing the fee chargeable in any suit for possession or joint possession between trustees or between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee to one-third of what it would be if the suit related to a claim in respect of private property. The reduction is restricted to suits in which the status of the defendant as trustee either at the time of the suit or previously, is undisputed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a certificate in favour of the petitioners herein for refund of Rs. 774-15-0 being the excess court-fee that has been paid on the memorandum of appeal in Application No. 280 of 1943 on the file of the High Court preferred against the decree of the District Court of East Tanjore at Negapatam in O. S. No. 14 of 1942.

R. Sundaralingam for Petitioners.

A. V. Viswanatha Sastri and R. Viswanathan for Respondents.

The Government Pleader (K. Kuttikrishna Menon) on behalf of the Crown.

The Order of the Court was made by

King, J.—This petition relates to Appeal No. 280 of 1943 and is filed by the appellants. The appeal was filed on the 9th August, 1943, and a court-fee of Rs. 1,162-7-0 was paid. It is now contended that in accordance with the terms of a notification published in Government Order No. 5791 dated the 17th May, 1943, this court-fee is excessive and that all that need have been paid was one-third of the amount. The notification runs :

"In exercise of the powers conferred by section 35 of the Court Fees Act, 1870, His Excellency the Governor of Madras is hereby pleased to reduce the fee chargeable in any suit for possession or joint possession between trustees, or between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee, to one-third of what it would be if the suit related to a claim in respect of private property."

Court-fee has been paid on the appeal on the footing that the ordinary court-fee-payable on a claim in respect of private property was due. The learned Government Pleader opposes this application and holds that the suit in question does not fall within the terms of the notification. This is a suit by two plaintiffs who claim to be trustees of certain trust property against the defendants who put forward the same claim. It is possible that a "suit between trustees," is an expression which might in other circumstances have been applied to such a situation; but it seems to us that in view of the second portion of the notification relating to a suit between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee, the intention of Government was to restrict the notification to suits in which the status of the defendant as trustee either at the time of the suit or previously is undisputed. Here of course the plaintiffs do not concede that the defendants have any right to be trustees. In these circumstances we hold that the application must fail and that what the appellants have already paid is the correct court-fee. This application is accordingly dismissed with costs.

K.S.

Application dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Merla Janikamma

.. Appellant*

v.

Sri Inuganti Venkatarajagopala Chinnarao Garu

.. Respondent.

Limitation Act (IX of 1908), article 156—Date of decree—Meaning—Finding in mortgage suit that property belonged to joint family—Plea in scaling down proceedings that property was self-acquired property—No res judicata—Madras Agriculturists' Relief Act (IV of 1938), section 19.

A mortgagee filed a suit on a mortgage executed by the respondent's father in her favour alleging in the plaint that the property was the self-acquired property of the mortgagor and in the alternative that even if the property were joint family property the mortgage debt was binding on the other member of the family, viz., the respondent. The suit was decreed in 1935 on the basis that the property was joint family property and that the debt was binding on the family. There was therefore no occasion to appeal against the finding that the hypotheca was not the self-acquired property of the mortgagor. In 1942, the decree was scaled down on the application of the respondent under section 19 of the Madras Agriculturists' Relief Act, when execution proceedings were in progress. On appeal against the decree so amended, in 1943,

Held, (i) that the phrase "the date of the decree" in article 156 of the Limitation Act meant the date when the decree became appealable to the party concerned and therefore the present appeal was not barred by time. The decree of 1935 having granted to the appellant all the reliefs she claimed, no appeal could be preferred then on the adverse finding with respect to the nature of the property as it was a finding to which no reference was made in the decree.

(ii) No finding of a Court of first instance can be said to have finally decided any matter in issue when a competent appeal has been preferred from the decree; and the finding cannot operate as *res judicata*.

(iii) Though the onus of proving that the property was the separate property of the father was on the mortgagee, it was incumbent on the respondent to show that the family was possessed of some property with the aid of which the property in dispute could have been acquired, before the mortgagee is called upon to assume his burden.

Peer Ammal v. Nalluswami Pillai, (1930) 60 M.L.J. 239 : I.L.R. 54 Mad. 455; *Venkataramayya v. Seshamma*, I.L.R. (1937) Mad. 1012, followed.

Viswanathan Chetti v. Ramanathan Chetti, (1901) I.L.R. 24 Mad. 646, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada, dated 10th December, 1935, and made in O. S. No. 16 of 1935 as amended by the order dated 9th November, 1942, and made in I. A. No. 1683 of 1938, on the file of the said Court of the Subordinate Judge of Cocanada.

V. Suryanarayana for Appellant.

Sir A. Krishnaswami Ayyar and *P. S. Raghavarama Sastri* for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal brought by the plaintiff against a mortgage decree passed by the Court of the Subordinate Judge of Cocanada on 10th December, 1935, and amended by the same Court on 9th November, 1942, under the provisions of the Madras Agriculturists' Relief Act, 1938.

The mortgage bond on which the suit was based was executed by the respondent's father for a sum of Rs. 40,000 describing the properties charged as his self-acquired and separate properties. Relying on this description, the appellant alleged in the plaint that the properties were the separate properties of the mortgagor, but as the respondent was claiming an interest therein as the undivided son of the mortgagor he was also impleaded in the suit and a decree for sale of the entire properties was sought on the footing that even if the properties were found to be the joint family properties of the respondent and his father, the latter having granted the mortgage for purposes binding on the respondent, the mortgage was valid also in respect of the respondent's interest. The mortgagor was the first defendant and the respondent the third defendant in the suit. Certain other persons were also made parties but this appeal is concerned only with the third defendant, the sole respondent.

The Court found that the mortgaged properties were joint family properties of the respondent and his father but the mortgage having been effected mainly for

the purpose of discharging certain antecedent debts of the mortgagor, it was binding on the respondent, and passed a decree for Rs. 11348-6-4 with subsequent interest and costs to be recovered by sale of the entire hypotheca including the respondent's half share therein. The decree having thus granted to the appellant all the reliefs he claimed, though his case that the hypotheca was the separate property of the mortgagor was found against, the appellant had no occasion to prefer an appeal to displace that finding, as indeed no appeal could be preferred against a mere adverse finding to which no reference was made in the decree.

While proceedings in execution were in progress, the Madras Agriculturists' Relief Act, 1938 (hereinafter referred to as the Act) was passed for a compulsory scaling down of debts due by "agriculturists" as defined in the Act. The respondent claiming to be such an agriculturist applied under section 19 to have the decree scaled down and 'amended' in accordance with the provisions of the Act. The application was opposed by the appellant on the grounds, *inter alia*, (1) that the respondent was not an agriculturist within the meaning of the Act, and (2) that, in any case, the hypotheca was the separate property of the mortgagor who was not an agriculturist and as the respondent was not made personally liable under the decree, he was not in any way affected by it and so could not claim to have it scaled down. It is to be observed that in order to qualify as an agriculturist under the Act, the respondent must have 'a saleable interest in any agricultural or horticultural land' of the kind described in section 3 (ii), and the mortgaged property being admittedly such land, the first ground of objection would fail if the property is owned by the joint family. The finding arrived at in the suit in regard to the joint family ownership of the property would thus be a complete answer to both the grounds of objection raised by the appellant if such finding could be regarded as *res judicata* in the proceeding for scaling down the decree, and the respondent contended accordingly. The Court below accepting the contention, refused to try the same issue again and amended the decree, so far as the respondent was concerned, by (1) wiping out all the interest accrued due till the 1st October, 1937, under section 8, (2) reducing the interest on costs from six per cent. to five per cent. per annum till 22nd March, 1938, under section 9, and (3) separating the respondent's half share of the debt as scaled down from that of his father (who was a non-agriculturist) under section 14. The result was that the respondent's liability was reduced to Rs. 20,000 (half of the principal sum originally advanced) with interest at six per cent. per annum from 1st October, 1937, till date of payment and half the costs with interest at five per cent. per annum from 10th February, 1936, till 22nd March, 1938, and thereafter at six per cent. per annum till date of payment, his half share in the mortgaged property being made liable only for the reduced amount. The relief granted to the appellant under the original decree having thus been materially altered to her prejudice by the "amendment" under section 19 of the Act, she has preferred this appeal from the decree as amended, challenging the correctness of the view taken by the learned Subordinate Judge on the question of *res judicata* and seeking to have the finding in the suit as to the joint family ownership of the mortgaged property reversed and set aside by this Court.

The decree having been passed in 1935 and the appeal having been presented in 1943, a question of limitation arises at the threshold. Under article 156 of the Limitation Act the period prescribed for civil appeals to this Court is ninety days from "the date of the decree or order appealed from." If time ran from the date of the original decree the appeal would be hopelessly barred but if the period is calculated from the date of the amendment of the decree by the Court below on 9th November, 1942, the appeal would be well within time. The question is which is the correct *terminus a quo* in the circumstances of the case, the date of the original decree or the date of the amendment? It has to be borne in mind in this connection that the amendment here in question was not one made in order to express the real intention which the original decree was meant to express but did not, such as an amendment under section 152 of the Code of Civil Procedure, in which case it may be that the amendment does not give rise to a fresh starting point.

though it may be a proper ground for extension of time under section 5 of the Limitation Act (see *Viswanathan Chetti v. Ramanathan Chetti*¹). The position here is different and the circumstances are somewhat peculiar. The appellant, as already stated, had obtained under the original decree all the relief she had sought in the suit in spite of the adverse finding on the question of the joint family ownership of the hypotheca. She could not, therefore, have appealed from the decree which made no reference to the finding (see *Run Bahadur Singh v. Lucho Koer*²). The "amendment" under section 19 of the Act, however, brought about a vital alteration, as we have explained above, by substantially reducing the relief originally granted to her, and this alteration was based on the adverse finding which previously was not prejudicial to her. It would be startling if, in such circumstances, the appeal were to be held barred by limitation long before the appellant's right of appeal came into being. Such a construction of the phrase "the date of the decree" in article 156 cannot be accepted. The article clearly presupposes that the remedy by way of appeal has become available to the appellant, and the date of the decree can only mean the date when the decree became appealable for the party concerned (Cf. *Peer Ammal v. Nalluswami Pillai*³). It follows that the appeal is not barred by time. We may here observe that, even otherwise, we should have readily extended the time under section 5 of the Limitation Act for, in our opinion, this is eminently a case where such extension would be justified.

The appeal against the amended decree in so far as it has disallowed a portion of the relief claimed in the suit being thus admissible, no finding of the lower Court on which such disallowance is based can be *res judicata*, for the simple reason that no finding of a Court of first instance can be said to have "finally decided" any matter in issue when a competent appeal has been preferred from its decree.

Turning now to the merits of the issue relating to the ownership of the hypotheca, we are of opinion that the finding arrived at in the suit cannot be supported. No evidence was produced by the respondent to show that the property in question belonged to the joint family of himself and his father. It is not disputed that the properties were purchased by the father in his own name, and in more than one transaction he asserted his exclusive right to them as his self-acquisitions. It was urged for the respondent that if any member of a Hindu joint family claimed any property in his possession to be his separate property the onus was on him to prove that it was acquired by him out of his own funds and without the aid of the family estate. But before the appellant could be called upon to assume such burden, it was incumbent on the respondent to show that the family was possessed of some property with the aid of which the property in dispute could have been acquired (see *Venkataamayya v. Seshamma*⁴). In the absence of any evidence to that effect, it was for the respondent to establish that the mortgaged property was joint family property (see *Rai Shadi Lal v. Lal Bahadur*⁵) and he has failed to do so. The finding of the lower Court on this issue is apparently based upon a misreading of the evidence of P. W. 4. There is nothing in it to warrant the supposition that there was a nucleus of family property. The mortgaged property must therefore be held to be the self-acquisition of the mortgagor in which the respondent can have no interest. It follows that the respondent, being in no way liable under the mortgage in question, has no *locus standi* to make any application under the Act in respect of the debt.

In the result, the amended decree is set aside and the original decree dated 10th December, 1935, restored, subject to the modification that the respondent and the 2nd defendant whose name is said to have been included by mistake will be exonerated from liability. The respondent will pay the costs of this appeal and of the I. A. No. 1683 of 1938 to the appellant.

V.P.S.

Appeal allowed.

1. (1901) I.L.R. 24 Mad. 646.
 2. (1884) L.R. 12 I.A. 23 : I.L.R. 11 Cal. 301 (P.C.).
 3. (1930) 60 M.L.J. 239 : I.L.R. 54 Mad. 455.
 4. I.L.R. (1937) Mad. 1012.
 5. (1932) 64 M.L.J. 298 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HORWILL.
Nagireddi Ramulu and another. Appellants*

v.

Sri Chintalapati Venkata Suryanarayanaraju Garu and others . . . Respondents.

Inam grant—Whole-village inam—Whether both varams pass is a question of fact—Meaning of exhortation to make land bear fruit and enjoy—Cultivators paying higher rent for a long time than that paid in 1907—Presumption—Section 28—Estates Land Act (I of 1908).

Whether the grant of a village is of both varams or of melwaram only is largely a question of fact.

An exhortation to the grantee 'to make the land bear fruit and enjoy the fruits thereof' is inconsistent with the idea of the grant of the melwaram only.

Where it is found that cultivators of lands in an inam village were paying for a long time (18 years) rent higher than what was paid in 1907, it cannot be said that the rent was not fair rent within the meaning of section 28 of the Estates Land Act.

Appeal against the decree of the District Court of Vizagapatam in A. S. No. 41 of 1939, preferred against the decree of the Court of the Sub-Collector of Narasapatam Division in Land Suit No. 72, etc.

P. Satyanarayana Rao and P. Satyanarayana Raju for Appellants.

Sir A. Krishnaswami Ayyar, K. Venkatarama Raju, D. V. Reddi Pantulu and V. Govindarajachari for Respondents.

The Judgment of the Court was delivered by

Horwill, J.: S. A. Nos. 90 to 95 of 1943.—These second appeals and civil revision petitions have been considered in four batches. In the first and second batches, the plaintiffs, were the Chintalapati people, who owned two-thirds of the village of Etikoppaka, while in the suits out of which the third and fourth batches arise, the plaintiffs were the Kofa Uratla people, who own one-third of that village.

The first batch comprises S. A. Nos. 90 to 95 of 1943. All the suits out of which these second appeals arise were suits for rent or ejectment by the Chintalapati people. The allegation was that the village of Etikoppaka, in which the suit lands are situate, was an enfranchised whole inam village and that from the beginning the melwaram and kudiwaram rights in respect of all the lands in the said village passed to the mokhasadars of the village and have been enjoyed by them without objection. They claimed rent under an agreement of 1937. The contention of the defendants was that the grant was not of the melwaram and kudiwaram rights but of the melwaram only. The tenants also pleaded that the agreement entered into in 1937 was brought about by coercion and fraud and was therefore not binding on them. They relied upon an agreement of 1907 in which a very much lower rent was fixed. The only question of importance raised in this batch of suits was whether the Etikoppaka village became an estate in 1908 or whether it did not become an estate until the amending Act of 1936. That depended on the question whether the original grant was of both varams or of melwaram only. The Sub-Collector found the various issues in favour of the tenants and came to the conclusion that the grant was of the melwaram only and that the later agreement executed by the tenants was brought about by coercion. As on both these points the District Judge came to a contrary conclusion, the tenants have appealed.

The question whether the grant of a village was of both varams or of melwaram only was largely one of fact; but the learned advocate for the tenants has drawn our attention to the four documents marked as Ex. IX in Second Appeal 90 of 1943 and has contended that those documents indicate that the grant was of melwaram only. We are however of opinion that the learned District Judge was right in holding that from Ex. IX it was much more probable that the grant was of both varams. The first two documents in Ex. IX were mokhasa pattas, and in each of these the grantee was exhorted to make the land bear fruit and enjoy the fruits thereof. We think that this language is inconsistent with the idea of the grant of

* S. A. Nos. 90 to 95 of 1943, etc.

melvaram only, in which case one would have expected that the grantor would have exhorted the grantee to enjoy the revenue from the lands. The fact that the grantee was to make the land bear fruit and to enjoy the fruits thereof, suggests that he was to cultivate the lands himself or get them cultivated by others.

The learned advocate for the appellants also attacks the judgment of the lower Court on the ground that it failed to consider two important documents, namely, Exs. J-1 and B. Ex. J-1 is the Inam Statement given by the mokhasadars at the time of the Inam Commission. The only entry in the Inam Statement on which reliance is placed in this connection is that found in column 6, that the grant was made by the grantors to their brothers-in-law, Chintalapati Neeladri Raju and Simhadri Raju, from which it is argued that it is unlikely that the Maharaja would have granted the kudivaram to his brother-in-law. We do not consider this entry of very much significance. Ex. B is an account of the estate of 1785 and 1786, which shows that the ryots were getting a share of the produce, from which it is argued that ryots were already in possession of the land at the time when the grant was made and that one must therefore presume that what was granted to the mokhasadar was what was not already enjoyed by the ryots, namely, the melvaram interest only. We do not however know exactly when the grant was made; and we cannot fairly presume from the mere fact that ryots were enjoying the produce of lands in 1785 that they were enjoying occupancy rights at the time when the grant was made. Moreover, these accounts do not show that the ryots were entitled either to a fixed share or to a fixed quantity of the produce of the lands. On the contrary, they show that the quantity falling to the shares of the landlord and of the tenant varied from year to year. Ex. C-1 is another series of accounts much to the same effect. We do not think it necessary to refer to the various inconclusive statements found in the other documents, as we do not consider that they are of sufficient weight to disturb the finding of the lower Court on this point.

The learned advocate for the appellants has pointed out that in the two mokhasa pattas and in the first of the two takids one finds the telugu expression మౌసా which it is argued, stands for mousa, which was a circumstance very much relied upon by the Privy Council in *Seethayya v. Somayajulu*¹, as indicating that the grant was one of melvaram only. Madhavan Nair, J., however in *Kondapanaidu v. Mahakakshamma*² pointed out that it would not be safe to presume that మౌసా stood for mousa in the absence of an admission to that effect by the parties. In *Seethayya v. Somayajulu*¹, the parties agreed that మౌసా after the name of the village meant mousa. In the case considered by Madhavan Nair, J., as well as in the three documents which we are considering in this case—the మౌసా was in front of the name of the village. Two translators of this Court are of opinion that, read with the context, మౌసా stands for *madura* (hamlet) and one finds in the third document that the word *madura* is used in front of the words 'Kondakoppaka' as meaning a hamlet. Whether మౌసా means *madura* in these three documents or not, we are certainly not prepared to say that it means *mousa*. On the contrary, we think it highly improbable.

Another word which the learned advocate for the appellants considers of much significance is *salabadu* which is sometimes used to mean 'revenue,' though its ordinary meaning seems to be 'annual,' 'permanent,' or 'as usual.' We do not think that the use of this word in the documents comprised in Ex. IX affords an indication that the grantor intended to grant the melvaram only. The context indicates that 'salabadu' means 'as usual.'

The only other question in this batch of appeals is whether the rents which the tenants agreed to pay under the suit muchilikas are fair rents or not. The proviso to section 28 of the Madras Estates Land Act states :

1. (1929) 56 M.L.J. 730 : L.R. 56 I.A. 146 : 2. A.I.R. 1933 Mad. 194.
J.L.R. 52 Mad. 453 (P.C.).

"Provided that in the case of an estate within the meaning of sub-clause (d) of clause (2) of section 3, the rent or rate of rent lawfully payable by a ryot or tenant on the first day of November, 1933, shall be presumed to be fair and equitable at the commencement of the Madras Estates Land (Third Amendment) Act, 1936, until the contrary is proved."

It was open to the tenants to have contended that despite this presumption the rents were not fair. Although in their written statement they said that these agreements were brought about by coercion and fraud which they failed to prove—they did not say that the rents were not otherwise fair. They were for much higher rents than were paid in 1907, but one cannot thereby infer that the higher rates were unfair. The ryots had been paying the higher rates for eighteen years before the filing of the suit, and were therefore paying those rates long before November, 1933; and so in the absence of proof that all these agreements were brought about by coercion and fraud, there is every reason to think that the rates were fair. There was no issue raised on this point and the tenants made no attempt to prove that the rates were not fair.

These appeals are therefore dismissed with costs.

The second batch comprises Second Appeals Nos. 1676 to 1680 of 1943 and Civil Revision Petitions Nos. 1694 to 1699 of 1943. The only question raised in this batch of suits was whether the lands were private lands or ryoti lands. These suits were filed in the Court of the District Munsiff of Yellamanchili, who held in favour of the plaintiffs that the suit lands were private lands. The appeals from the decrees in these suits were heard together with the appeals from the decrees in the third and fourth batches; and instead of considering each batch on its merits the learned District Judge clubbed them together and considered only the preliminary question raised in the third and fourth batches, namely, whether the grant of an inam village in which minor inams had already been granted was an estate within the meaning of the Madras Estates Land (Amendment) Act, 1936. He held on the evidence adduced in all the three batches that the grant was of something less than the whole village and that, therefore, following the decision of several Benches of this Court—the grant was not of the whole of Etikoppaka and that the land granted was not an estate. This question was not raised either by the plaintiffs or by the defendants in the batch of suits which we are now considering and no issue was framed. It was not therefore proper for the learned District Judge to dispose of this batch of appeals in this way, merely because they related to the same village as was the subject of the other two batches of suits. In view of the case of the plaintiff himself that his land was part of an estate, the learned District Judge should have assumed that and proceeded to consider the question discussed by the first Court, namely, whether the suit lands were private lands or ryoti lands. These appeals and Civil Revision Petitions have therefore to be allowed and the first appeals remanded to the District Court for fresh disposal. If the District Judge considers that the plaintiff has proved that the suit lands are private lands, no further question will arise; but if he holds that the lands are not private lands, then he will of course have to consider the other issues in the suit. The costs of these appeals and Civil Revision Petitions will be costs in the cause. The court-fees paid in the second appeals will be refunded.

The third batch consists of Second Appeals Nos. 1681 and 1713 of 1943 and C. R. Ps. Nos. 1700 to 1710 and the fourth batch of C. R. Ps. Nos. 1673 to 1678 of 1943. Both these batches raise the question whether the grant excluded certain minor inams and if so whether the grant was of a village or not. In view of the bill published in the *Fort St. George Gazette* of Tuesday, July 25th, 1944, we think it desirable that these Second Appeals and Civil Revision Petitions should stand over until the bill is either passed into an Act or has been dropped. Both sides agree to this course. These appeals and Civil Revision Petitions will therefore be adjourned until the 9th October, 1944.

S. As. 90 to 95 of 1943 dismissed; S. As. 1676 to 1680 and C. R. Ps. 1694 to 1699 of 1943 allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Balireddi Vissanna *alias* Viswanadham and others

.. Appellants*

v.

Venkayala Appalanarasayya

.. Respondent.

Madras Agriculturists' Relief Act (IV of 1938), Section 8, Explanation—Mortgage in favour of two persons—Supersession by another in favour of one of them alone—Second debt cannot be treated as renewal for the purpose of the explanation to section 8.

Where a mortgage in favour of two persons is superseded by another mortgage in favour of one of them alone, the second debt is not in favour of the same creditor as the first and cannot be treated as a renewal for the purpose of the explanation to section 8 of the Madras Agriculturists' Relief Act.

Appeal against the decree of the District Court of Vizagapatam dated 25th August, 1943 and made in A. S. No. 398 of 1943 preferred against the decree of the Court of the District Munsiff of Vizagapatam in O. P. No. 11 of 1942.

B. C. Seshachala Aiyar for Appellants.

E. Venkatesam for Respondent.

The Court delivered the following

JUDGMENT.—When a mortgage in favour of A and B is superseded by another mortgage in favour of A alone, the second debt is not in favour of the same creditor as the first and cannot be treated as a renewal for the purpose of the explanation to section 8 of Madras Act IV of 1938. The appeal is dismissed with costs.

V.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Pitchika Somanna and others

.. Petitioners†

v.

Putchala Chinnayya

.. Respondent.

Madras Village Courts Act (I of 1889), section 73—Petitions under—Dismissal for default—Restoration of petitions—Not competent—Order 9, rule 9 of the Civil Procedure Code (V of 1908) is not applicable—Section 141 of the Code cannot make it applicable—Proper remedy.

Two petitions under section 73 of the Madras Village Courts Act were dismissed as the petitioners' vakil was absent and an adjournment of some fifteen minutes or so to enable him to be present was refused. On petitions for restoration,

Held, that there is no provision in the Civil Procedure Code or in the Madras Village Courts Act for the restoration of petitions dismissed for default, that Order 9, rule 9 of the Code of Civil Procedure does not apply to the proceedings and section 141 of the Civil Procedure Code cannot be invoked to make the remedy under Order 9, rule 9 applicable to such petitions.

Ananthargju Shetty v. Appu Hegade, (1919) 37 M.L.J. 162, relied on.

An order of refusal to grant an adjournment of a few minutes to enable the pleader to be present will be an error in the exercise of jurisdiction which may be interfered with in revision against that order under section 115 of the Civil Procedure Code.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the Court of the District Munsiff of Parvatipur dated 25th August, 1943, and made in I. A. No. 122 of 1943 in O. P. No. 24 of 1942 and I. A. No. 120 of 1943 in O. P. No. 23 of 1942, respectively.

Kasturi Seshagiri Rao for Petitioners.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—These petitions arise out of the dismissal of two applications brought under Order 9 of rule 9, Civil Procedure Code, for the restoration to the file of the lower Court of two petitions under section 73 of the Madras Village Courts Act. The facts in so far as they are necessary are that on an adjourned

* A. A. A. O. No. 359 of 1943.

† C. R. Ps. Nos. 42 and 43 of 1944.

hearing date the petitioners' vakil was absent and an adjournment of some 15 minutes or so to enable him to be present was refused. The petitions were dismissed and on the same day two petitions for restoration, supported by the necessary affidavit were presented, but the learned District Munsiff dismissed them on the ground that Order 9, rule 9 of the Code of Civil Procedure did not apply to proceedings under section 73 of the Madras Village Courts Act. He relied on the decision of Burn, J., in *Khizar Mahomed v. Abdul Razack Sahib*,¹ which was followed by me in *Subbamma v. Venkatareddi*².

The argument now presented is that although Order 9, rule 9 of the Code applies in terms only to suits, this remedy is made applicable by section 141 of the Code to all proceedings in any Court of civil jurisdiction. In support of the argument reliance has been placed on the decision of Wadsworth, J., in *Lakshmudu v. Saramma*³ and *Venkatasubbarayudu v. Anusuya Devi*⁴. In both these cases the learned Judge held that an application made under section 23 of the Madras Agriculturists' Relief Act which had been dismissed for default can be restored under Order 9, rule 9 read with section 141 of the Civil Procedure Code; but I am bound by the decision of the Bench in *Anantharaju Shetty v. Appu Hegade*⁵, in which section 141 of the Code was relied on to support the action of a District Judge in reviewing his own order passed under section 10 of the Religious Endowments Act, 1863. Oldfield, J., pointed out that the Act contained no explicit provision for review and in dealing with section 141 of the Civil Procedure Code, he made the following observation :

"That section however does no more than provide for the procedure to be adopted by Courts of civil jurisdiction in dealing with matters before them. It does not authorise an appeal, since that would not be a matter of procedure, but the recognition of substantive right, which must be conferred in explicit terms. And similarly it confers no right to a review."

Seshagiri Ayyar, J.'s opinion was expressed in similar terms :

"It was next argued that section 141 of the Civil Procedure Code is indicative of a general enunciation of principle by the legislature that to all the judicial proceedings, the Civil Procedure Code is applicable. The section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses, etc., which are to be found in the Code and not that the Code is to be applied in its entirety to such proceedings, including power of appeal and of review."

The same principle applies to the power of restoration which is conferred by Order 9, rule 9 of the Code to suits dismissed for default. There is no provision in the Code or in the Madras Village Courts Act for the restoration of petitions dismissed for default.

Regarding the merits, however, something must be said. According to the petitioners' affidavit in the lower Court, they applied for 15 minutes' grace in order that their pleader might be present. In conducting their daily business advocates frequently find it necessary to make small adjustments in order to meet each other's professional convenience and the convenience of the Courts; if the learned District Munsiff had in fact refused to grant an adjournment of this brief duration for the reason stated, I consider that he erred in the exercise of his jurisdiction and I would have been prepared on the facts stated to interfere in revision under section 115 of the Civil Procedure Code.

The result of these petitions must be that they are ordered to be dismissed with costs with one advocate's fee.

K.S.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

P. S. Venkatasubbier and another

*Petitioners.**

Government of India Act (1935), sections 102 and 297 and schedule VII, List II, items 27 and 29—Defence of India Rules, rule 75-A—Requisitioning of movable property (paddy) by grains purchase officer—Validity.

1. (1941) 2 M.L.J. (N.R.C.) 88.

2. (1942) 2 M.L.J. 356.

3. (1940) 2 M.L.J. (N.R.C.) 71.

* Crl. R. C. No. 833 of 1944.

(Crl. R. P. No. 786 of 1944).

4. (1941) 53 L.W. (S.R.C.) 76.

5. (1949) 37 M.L.J. 162.

The requisitioning of movable property although not specifically enumerated in the Provincial Legislative List is clearly included in more general subjects which find a place in that list. There is no limitation of the powers of the Provincial Government with respect to the subjects included in the Provincial Legislative List except in so far as the power is controlled by some provision of the Government of India Act. Section 297 of the Act does restrict the powers of Provincial Legislatures in regard to matters listed in items 27 and 29 in certain respects, but not in respect of the power to requisition goods within the Province. The power of the Provincial Legislature to make laws with respect to "trade and commerce" within the province and with respect to the "production, supply and distribution of goods" includes the power to requisition goods for public purposes.

In a prosecution of certain merchants for an offence punishable under rule 75-A (7) of the Defence of India Rules by reason of their failure to comply with an order requisitioning their paddy stocks issued by the grains purchase officer of a District under rule 75-A, the objection was taken that rule 75-A was *ultra vires* the Government of India Act.

Held, that the objection to the validity of rule 75-A was not tenable.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Second Additional First Class Magistrate, Trichinopoly, dated 17th October, 1944, and passed in C. C. No. 490 of 1944.

V. T. Rangaswami Aiyangar and K. Aravamuda Aiyangar for Petitioners.

The Court made the following

ORDER.—The petitioners are being prosecuted before the Second Additional First Class Magistrate, Trichinopoly, for failure to comply with an order requisitioning their paddy stock issued by the grains purchase officer, Trichinopoly, an offence punishable under rule 75-A (7) of the Defence of India Rules.

The petitioners raised a number of preliminary objections to their trial which have been overruled by the Additional District Magistrate and the petitioners pray, in the petition now under consideration, that the order of the Additional District Magistrate be revised. Rule 75-A of the Defence of India Rules provides that the Central or the Provincial Government may requisition any property, movable or immovable; and the principal argument advanced in support of the petition is that the provision for requisitioning movable property is *ultra vires* the Government of India Act. Section 102 (1) of the Government of India Act empowers the Governor-General, if he has declared by proclamation that a grave emergency exists, to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List; and, it is said, since the acquisition of movable property is not a matter enumerated either in the Federal or the Provincial Lists, rule 75-A of the Defence of India Rules in so far as it relates to the requisitioning of movable property is *ultra vires* section 102 of the Government of India Act. The argument is enforced by reference to section 299 (2) of the Government of India Act, which provides that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, etc., unless the law provides for compensation, and also by reference to the fact that the compulsory acquisition of land is enumerated as item 9 of the Provincial Legislative List.

In my opinion the references to section 299 of the Government of India Act and item 9 of the Provincial Legislative List do not assist the main argument, and the argument itself breaks down because the requisitioning of movable property although not specifically enumerated in the Provincial Legislative List is clearly included in more general subjects which find a place in that list. Section 299 of the Government of India Act has no application because, in the present case, there is no question of requisitioning without compensation; and the fact of the inclusion of the "compulsory acquisition of land" as a subject in the Provincial Legislative List does not mean that the acquisition of all other kinds of property is excluded. The acquisition of land is a matter with which Governments are constantly concerned and it is natural that it should be placed in a separate category. If the other items are examined it is seen that in item 27 is included "trade and commerce" within the Province and in item 29 "production, supply and distribution of goods." It has to be remembered that there is no limitation of the powers of Provincial Govern-

ments with respect to the subjects included in the Provincial Legislative List except in so far as the power is controlled by some provision of the Government of India Act. Section 297 of the Government of India Act does restrict the powers of Provincial Legislatures in regard to matters listed in items 27 and 29 in certain respects, but not in respect of the power to requisition goods within the Province. The power of the Provincial Legislature to make laws with respect to trade and commerce within the Province and with respect to the "production, supply and distribution of goods," I have no doubt, includes the power to requisition goods for public purposes.

The objection with regard to the validity of rule 75-A of the Defence of India Rules in so far as it authorises the requisition of movable property is the only objection raised which, if accepted, would justify the dismissal of the case *in limine*. It is argued that the grains purchase officer had, in any event, no power to require the delivery of the paddy to him. The manner in which delivery is to be taken of the paddy is a matter for evidence; and this and any of the other objections are matters which must be raised in the course of the trial.

For the reasons given above, the petition is dismissed.

(This case coming on for further orders, having been set down "to be spoken to" the Court made the following)

ORDER.—There is a question of law, but, not in my opinion, a substantial question; and, for that reason, I did not admit the Criminal Revision Petition. Leave to appeal to the Federal Court is refused.

V.S.

Petition dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sreenivasa Iyer

*Petitioner**

v.

Govinda Kandiyar and another

Respondents.

Slavery bond—Bond evidencing an advance to agricultural labourers containing an undertaking by one of them to work on the farm of the creditor in lieu of interest—Default penalised by liability to pay interest on the advance at 24 per cent. per annum—No prohibition against seeking service elsewhere—Bond not a slavery bond.

A bond evidencing an advance to agricultural labourers recited: "the amount borrowed from you by us in cash is Rs. 86. In lieu of interest on the said amount of rupees eighty-six, Vayira Pada-yachi of us shall remain in your pannai (farm), and do the pannai labour and receive the wages, kalavadi, manyam according to the pannai usage. On the above understanding we have executed this document. In case of failure to do so or in case labour is undertaken elsewhere, or in case of non-appearance for work, we agree to add interest at the rate of Rs. 2 per cent. per month from that date and pay the same whenever demanded by you without pleading any apportionment of liability."

In a suit to recover the money due under the bond on the labourer leaving the creditor's employment, on a contention that the document in question constituted a slavery bond and was hence unenforceable,

Held, that there was nothing in the document in the nature of a slavery bond. Though the system of granting advances to agricultural labourers on such terms may be a bad one, it could not be said that they bind persons entering into such bonds as slaves to their masters.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Tiruturaipundi, dated 17th September, 1943, and passed in S. C. S. No. 302 of 1943.

S: Panchapagesa Sastri and P. S. Ramachandran for Petitioner.

K. S. Desikan and R. Raman for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The first respondent is the father-in-law of the second respondent. On the 18th July, 1929, they executed a bond in favour of the petitioner. Under it the second respondent was to work as a farm labourer for the petitioner. The second respondent left the petitioner's employment on the 1st May, 1942, whereupon the petitioner filed S. C. S. No. 302 of 1943 in the Court of the District Munsiff, Tiruturaipundi, to recover the money due under the bond. The District Munsiff held that the document constituted a slavery bond and dismissed the suit. The question which we are called upon to decide is whether the bond can in law be regarded as a slavery bond.

The operative part of the bond reads as follows :

"For paying and discharging the dues under the debt and for personal labour executed by Vayira Padayachi out of us in favour of Manakkudi Rama Mudaliar for Rs. 70 and the dues under promissory note for Rs. 30, in all Rs. 100 for two items, free from all claims, excluding the amount paid already, the amount borrowed from you by us in cash is Rs. 86. In lieu of interest on the said amount of rupees eighty-six, Vayira Padayachi of us shall remain in your pannai (farm), and do the pannai labour and receive the wages, kalavadi, manyam according to the pannai usage. On the above understanding we have executed this document. In case of failure to do so or in case labour is undertaken elsewhere, or in case of non-appearance for work, we agree to add interest at the rate of Rs. 2 per cent. per month from that date and pay the same whenever demanded by you without pleading any apportionment of liability. To this effect we have executed this bond apart from the bond in respect of personal labour executed by Govinda Kandian out of us on the 5th July, 1910, and apart from the sundry amounts we have received."

It will be observed that the defendants received in cash the advance of Rs. 86. This advance was not to be called in while the second defendant worked for the plaintiff. In case he refused to do so the advance was to be repayable with interest at two per cent. per month from the date when the plaintiff ceased to have the use of the second defendant's services. The second defendant was not prohibited from applying for service elsewhere.

There is nothing here in the nature of a slavery bond. It is true that the rate of interest is very high, but under the existing law, the Court has power to reduce exorbitant interest. Moreover, the plaintiff in bringing this suit only claimed interest at $6\frac{1}{4}$ per cent. per annum from the date when the second defendant left his farm.

The case falls well within the principle recognised by this Court in *Periana Kone v. Palayathan*¹ and *Kannakkal v. Karuppan Samban*². The decisions of this Court in *Sundara Reddi v. Jagannathan*³ and *Rama Sastriar v. Ambalakaran*⁴ are based on entirely different facts and the judgments have no application. It is true that the case for the respondents receives support from the decision of the Calcutta High Court in *Ram Swarup Bhagat v. Bansi Mandar*⁵, where the facts were very much the same, except that the repayment was to be made in a certain month in any year and that on default interest at 75 per cent. per annum was to be charged. We are not prepared to follow this decision. As we have said, there is nothing in the bond here in the nature of slavery and the decisions of this Court in *Periana Kone v. Palayathan*¹ and *Kannakkal v. Karuppan Samban*² support this view. The system of granting advances to agricultural labourers on these terms may be a very bad one; but it is quite a different thing to say that they bind persons entering into such bonds as slaves to their masters.

The petition for revision must be allowed and a decree passed in favour of the petitioner in accordance with the prayer in his plaint with costs here and below.

V.S.

Petition allowed.

1. (1919) 10 L.W. 202.
2. (1926) 25 L.W. 601.
3. A.I.R. 1927 Mad. 818.

4. A.I.R. 1929 Mad. 267.
5. (1915) I.L.R. 42 Cal. 742.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD PORTER, LORD GODDARD AND SIR MADHAVAN NAIR.
Shri 108 Puja Pad Udit Panch Parmeshwar Panchaiti Akhara

Udasi Nirwani

.. Appellant*

v.

Surajpal Singh *alias* Chhedi Singh and others

.. Respondents.

Hindu Law—Debts—Antecedent debt—Purchase by father of property subject to mortgage—Retention of part of the consideration for its discharge—Mortgagee not paid off—Fresh mortgage by father in favour of same mortgagee to discharge the prior encumbrance—No antecedent debt and son of the mortgagor not liable on that ground—Debts on promotes with contemporaneous promise to execute mortgage later on—Mortgage executed subsequently in pursuance of the undertaking—Not one to discharge an antecedent debt.

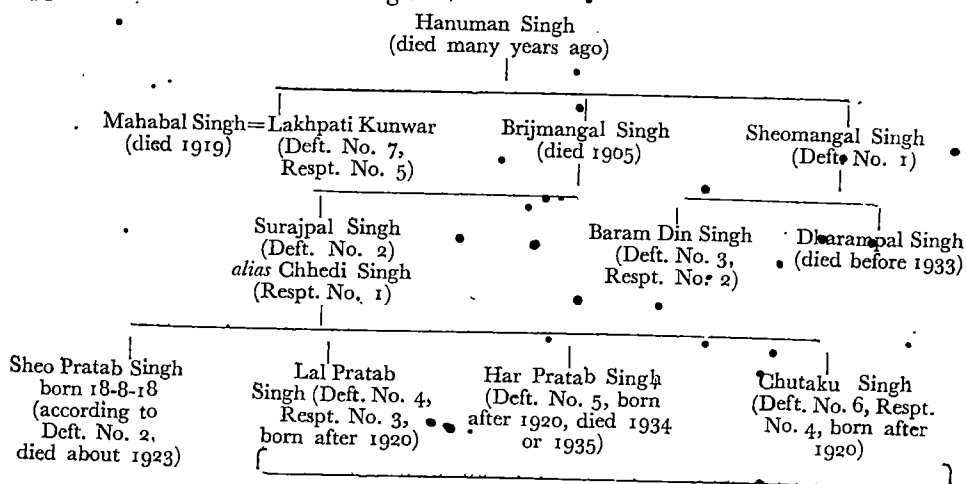
A Hindu father who purchases property subject to a mortgage and retains a part of the consideration to answer the amount due on the mortgage but does not pay off the mortgage, does not thereby become indebted to the mortgagee in respect of that sum for he is under no liability to him in respect of it. Hence a subsequent borrowing by such a purchaser from the mortgagee himself on a fresh mortgage to free the property from the prior encumbrance is not a mortgage to pay off an antecedent debt and would not bind his son.

Where at the time of execution of the promissory notes in respect of certain loans there is an intention and a promise to secure them by a subsequent mortgage and such a mortgage is later on executed to cover such debts, the whole transaction is conceived and carried out as part of the same bargain, and hence such a mortgage is not one to discharge an antecedent debt which would bind the son of the mortgagor.

Their Lordships' Judgment was delivered by

LORD PORTER.—The appellant in this case is a registered Society which carries on the business of money-lending. It appeals from a decree of the High Court at Allahabad, dated the 8th February, 1939, which varied the decree of the Subordinate Judge.

The respondents are members of a joint undivided Hindu family governed by the Mitakshara School. The decree of which complaint is made, was pronounced in an action brought by the appellant upon a simple mortgage dated the 22nd September, 1920. The family tree of the Hindu family and the members sued appear from the table following :—



• Minors at date of suit (8—2—33).

By the mortgage of the 22nd September, 1920, Sheo Mangal Singh who was then *karta* of the family, Surajpal Singh, his nephew and Lakshpati Kunwar, his sister-in-law, mortgaged certain family property in favour of the appellant.

This mortgage was given in consideration of a sum of Rs. 35,542-1-0 made up as follows :

ITEM.	Rs.	A.	P.	Rs.	A.	P.
1. Promissory Note dated the 30th October, 1917, executed by Mahabul Singh ..	..	..	..	4,153	0	0
2. "Due under the Account Book" (According to plaintiff's cash book borrowed by Sheo Mangal Singh on the 22nd December, 1918, for purchasing linseed). ..	..	..	..	461	0	0
Interest on the above two items ..	..	..	..	517	13	0
3. Due to the plaintiff under a mortgage dated the 26th September, 1916, subject to which Sheo Mangal Singh had purchased the mortgaged property on the 3rd September, 1917 ..	..	..	..	2,756	5	9
Amounts borrowed on promissory notes, in order to pay off debts due by Rudra Pratab Singh (a son of a sister of Sheo Mangal Singh), as under :—	..	..	..	..	..	..
4. Promissory Note dated the 14th March, 1919 ..	8,500	0	0	..	..	..
5. Promissory Note dated the 20th March, 1919 ..	2,500	0	0	..	..	..
6. Promissory Note dated the 24th March, 1919 ..	500	0	0	..	..	..
7. Promissory Note dated the 15th April, 1919 ..	2,000	0	0	..	..	..
8. Promissory Note dated the 12th June, 1919 ..	10,000	0	0	..	..	..
Interest on the above ..	2,575	9	3	26,075	9	3
(N.B.—The Promissory Notes for Rs. 8,500 and Rs. 2,500 were executed by both Mahabul Singh and Sheo Mangal Singh that for Rs. 500 by Mahabul Singh and the remaining two by Sheo Mangal Singh.)	..	..	..	..	..	..
9. Amount borrowed by Sheo Mangal Singh on a Promissory Note in order to pay Government Revenue : Promissory Note dated 2nd February, 1920, signed by Sheo Mangal Singh ..	1,000	0	0	..	..	..
Interest ..	55	13	0	1,055	13	0
10. Loan taken on the 9th October, 1920, for completion of the deed and for other expenses ..	..	..	..	522	8	0
	..	..	..	35,542	1	0

The principal sum and interest was payable after six years and interest was to run at 10 annas per cent. per month with yearly rests. The mortgage deed was executed by Lakhpati as a nominal party only, because her name appears to have been inserted in the register as an owner in the case of some of the properties. The question which their Lordships have to determine is the extent to which the joint family property is bound.

Of the items claimed : Nos. 1 and 2 have been disallowed by the High Court against all the respondents and the appellants do not now dispute this decision. Both Courts allowed item 9 as against the respondents and no appeal has been taken against this decision.

Accordingly, the right of the appellant to recover in respect of items 3 to 8 alone is in dispute but as the questions arising under item 3 differ somewhat from those arising under items 4 to 8, the facts must be separately set out.

Before September, 1916, Raghubar and Ram Adhin, who appear to have been its then owners, mortgaged the village of Jitput to the plaintiff to secure a loan of Rs. 1,950 with interest at 1 per cent. per month with half-yearly rests. On the 3rd September, 1917, Raghubar transferred an 8 annas share in most of the village to Sheo Mangal Singh for Rs. 2,600 of which Rs. 400 were handed over to the vendor and the remaining 2,200 retained to answer the principal sum and interest to date on the mortgage. This last sum was not however used to pay off that mortgage. It was used for some other purpose and the sum of Rs. 2,756-5-9 included in the mortgage in suit under item 3 was borrowed and used in order to free the village from that liability. The land so purchased is undoubtedly family property and itself subject to the mortgage in suit to the extent of the principal sum of Rs. 2,756-5-9 with interest at the contractual rate, but the appellant claims that the whole of the rest of the family estate is likewise bound as security for this debt,

The paying off of the old mortgage and inclusion of the debt so incurred in the new is in the first place said to be beneficial to the family and therefore properly imposed as a liability upon the whole of the family property. Secondly it was said that in any case the debt was incurred by Sheo Mangal Singh in payment of an antecedent debt owing by him and therefore that it was the duty of his son Baram Din to answer his father's debt, whether the father was alive or dead. If there had been an antecedent debt owing to the appellant which Sheo Mangal Singh was legally obliged to pay, Baram Din might be liable under the well-known doctrine the principles of which are set out by their Lordships' judgment in *Brij Narain v. Mangla Prasad*¹.

But Mangal Singh in fact was not previously indebted to the appellant. Rs. 2,200 had, it is true, been left with him by Raghubar that he might pay it to the appellant but Mangal Singh was under no liability to the appellant in respect of this sum.

There was, therefore, no antecedent debt and the appellant is thrown back upon the argument that the inclusion of the sum of Rs. 2,756-5-9 on the mortgage sued upon was for the benefit of the family. Undoubtedly the 8 annas share in the village became joint family property and was subject to the original mortgage until it was paid off. Accordingly it is urged, that it was beneficial to reduce the interest by redeeming the earlier mortgage and transferring the liability to the later even though the joint family property as a whole thereby became mortgaged instead of, as formerly, only the particular village of Jitpur. Their Lordships are not persuaded that this is so. No evidence of the value of the encumbered village has been given, and in the embarrassed state of the family it almost certainly would have had to be sold to answer the principal and interest secured by the one mortgage or the other. Instead of imposing a liability upon the family Sheo Mangal Singh might well have allowed the property to be sold. It is true that by so doing he would have deprived the family of an asset which otherwise would be theirs, but it is by no means clear that having regard to the mortgage with which it was burdened the asset was a valuable one or that to preserve it even at the lower rate of 10 annas per month in the place of a rupee a month as provided by the earlier mortgage was beneficial to the family. Even at the reduced rate it might well have been wiser to sacrifice the village rather than to burden the entire family estate with the additional sum. This is the view of the High Court and their Lordships see no reason for differing from it.

Items 4 to 8 were borrowed in order to pay the debts and preserve the estate of one Rudra Pratab Singh, a son of a sister of Mahabal Singh.

It is not now contended that this borrowing was either for necessity or beneficial to the family. Two defences, however, are set up—firstly, that the infant sons of Surajpal Singh are not entitled to contest the liability of the family estate as security for the mortgage debt and secondly, that in any case, the liability was incurred in order to repay their father's antecedent debt. In support of the former proposition it is asserted that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later-born child to contest the validity of the father's act.

Their Lordships do not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. They are content to assume its accuracy since they agree with the High Court in thinking it sufficiently established by the evidence that there was overlapping of lives in the present case. The matter stands thus:—Surajpal Singh stated that his first son was born on the

1. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 at 135 : I.L.R. 46 All. 95 (P.C.).

18th August, 1918 (*i.e.*, two years before the mortgage in question) and produced the birth register in support of his statement. He did not, however, produce the death certificate of that son nor the birth certificates or horoscopes of his younger sons. He did, however, say that his second son was seven months old when his eldest son died and in cross-examination that horoscopes of his sons had been prepared and were at his house, and that he kept accounts of income. The learned Subordinate Judge did not accept his evidence on the ground (1) that he had not produced the horoscopes, whereas he would in the learned Judge's view have done so if they had supported his evidence, (2) that he had not produced the death certificate of the eldest son, and (3) that if accounts of income were kept, accounts of expenditure must also have been kept and would show the date on which money had been expended for the funeral ceremonies. It is to be observed, however, that no question as to the time at which the eldest son died or his brothers were born was expressly raised in the pleadings nor did it form one of the issues. Consequently Surajpal may well be excused for not coming to Court armed with the death certificates or horoscopes: the birth certificate was of course essential to show that a son was alive at the date of the mortgage. It was for the appellant who raised the point to challenge Surajpal's evidence by cross-examination, and he did not do so. The actual questions asked were most perfunctory—the production either of the death certificates, the horoscopes or the accounts was not asked for. Nor do their Lordships consider that Surajpal's evidence is weakened by his statement that he did not know the date of his birth or of the birth of any of his sons. He might well have forgotten the exact dates and yet remember that one son died after another was born. Their Lordships agree with the High Court in thinking that there is no sufficient reason for rejecting the evidence of Surajpal upon this point which could have been challenged quite easily by the appellant in cross-examination or by the production of the death certificate of the eldest son.

In default of any serious challenge their Lordships, like the High Court, think it sufficiently established that the first born son did not die until after the birth of a younger brother, and hold that the minor sons are entitled to challenge the validity of the mortgage.

There remains the question whether the borrowing was undertaken in order to discharge the antecedent debt of a father. The answer depends on whether the sums set out under items 4, 5, 7 and 8 were first borrowed without any promise of future security or whether from the first there was an undertaking to secure them by mortgage, so that the whole matter was one transaction, not first a lending and at a later stage a consolidation of the sums lent and a separate transaction whereby they were secured on the mortgaged property. The appellant's witness, Bharam Das, denied that there "was any agreement for a mortgage when the money was lent and the promissory notes given" and the learned Subordinate Judge thought the transactions separate ones. He points out that the promissory notes are dated from March to June, 1919, whereas the mortgage did not take place until the 22nd September, 1920, more than a year later, that if the giving of a mortgage was part of the original transaction, the bargain would most naturally have been proved by Sheo Mangal Singh who with his deceased brother Mahabal Singh had been a party to it. No doubt, Sheo Mangal Singh might have given this evidence, but it has to be remembered that he was himself personally liable and did not even think fit to defend this action. In his absence the respondents called Suraj Din, a friend of Mahabal and Sheo Mangal Singh, who said he was present when the loan of Rs. 8,500 was made and that a mortgage was then promised. In this conflict of evidence their Lordships agree with the High Court that the appellant is most unlikely to have been willing to lend so large a sum to an indigent family except on the security of their property. The view of the High Court on this point is expressed in the words: "It seems to us impossible that the plaintiff did not intend there should be a mortgage for these loans and we consider that from the beginning the appellant intended that there should be such a mortgage." Their Lordships find themselves in agreement with this view and

like the High Court are of opinion that the debts were not antecedent but that the whole transaction was conceived and carried out as part of the same bargain.

In accordance with these views they would dismiss the appeal and confirm the decree of the High Court and will humbly advise His Majesty accordingly.

As the respondents have not appeared, there will be no order as to costs.

V.S.

Appeal dismissed.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD PORTER, LORD GODDARD AND SIR MADHAVAN NAIR.

Raja Jwaleshwari Pratap Narain Singh

*Appellant**

v.

Babu Parchand Bir Singh

Respondent.

Privy Council Appeal—Practice—Decision of suit partly in plaintiff's and partly in defendant's favour—Both filing separate appeals seeking different reliefs on different grounds—Plaintiff's appeal allowed while the defendant's dismissed—Appeal to Privy Council by defendant—Application for leave and grounds of appeal referring only to questions involved in plaintiff's appeal to lower Court—Defendant cannot raise before Privy Council questions involved in his own appeal—Civil Procedure Code, Order 45, rules 1 to 5—Will—Construction—Bequest to eldest son directing him to give his younger brothers, if they separated, property producing specified monthly income—Temporary remission of rent at time of separation, if should be taken into account in calculating income.

A suit was decided partly in plaintiff's and partly in defendant's favour. Both parties filed separate appeals seeking different reliefs on different grounds of objection. By one judgment the defendant's appeal was dismissed and that of the plaintiff allowed. In the latter appeal a separate decree was given and the defendant appealed against it to the Privy Council. The application for leave to appeal to the Privy Council and the grounds of appeal related solely to questions involved in the plaintiff's appeal to the lower Court and no complaint was made or reversal sought of the decree which dismissed the defendant's appeal. On a question as to the competency of the appellant to raise questions involved in his own appeal,

Held, that in the circumstances having regard to the practice and the terms of Order 45, rules 1 to 5 of the Civil Procedure Code, it was not open to the defendant to raise those questions before the Privy Council.

A will executed by a proprietor of a Raj directed that after his death his eldest son should be the absolute owner of the entire movable and immovable property but that he should support his two younger brothers so long as they lived in agreement and that if they elected to live separate, he should give them property yielding Rs. 500 per mensem for their maintenance and that it should be separated and handed over to them, who would thereafter be responsible for Government revenue and all zamindari matters. The parties separated and there were certain remissions of rent before and after the separation. On a question as to the mode of calculating the income,

Held, that the language of the will clearly indicated an intention on the part of the testator that the amount of income which the property to be given would produce was to be calculated with reference to the date at which the separation took place and that, therefore, the remissions of rent made, even if temporary, should be taken into account in calculating the income.

Their Lordships' Judgment was delivered by

LORD PORTER.—This appeal seeks to reverse a decree of the High Court of Judicature at Allahabad dated the 24th January, 1940, which in part affirmed and in part modified a decree of the Court of the Subordinate Judge of Basti dated the 1st June, 1936.

The parties are sons of the late Raja Pateshwari Pratap Singh who was proprietor of Raj Basti and died on the 19th March, 1928.

The Raja made his will on the 16th July, 1927, and after summarising the state of his family, states that by way of a precautionary measure he considers it desirable to make proper arrangement for the maintenance allowance to his two younger sons, the respondent and Babu Bijai Bir Singh, as follows :

"After my death, Lal Jwaleshwari Pratap Narain Singh, my eldest son shall be the Raja for the time and the absolute owner of the entire movable and immovable property appertaining to Basti Raj. He shall continue to support as heretofore and meet all reasonable needs of his two brothers Babu Parchand Bir Singh and Babu Bijai Bir Singh so long as the latter two Babu Sahebs live in agreement with Lal Jwaleshwari Pratap Narain Singh and act for the betterment and improvement of the Raj as desired by the latter. When the Babu Sahebs aforesaid or one of the Babus do not want

* P. C. Appeal No. 59 of 1942.

to work and look after the management under the orders of Lal Jwaleshwari Pratap Narain Singh or if, for some reason they want to become separate and live separately, they shall be entitled to babuai rights subject to all the conditions relating to the property of Babus all along obtaining to this estate and it shall be the duty of Lal Jwaleshwari Pratap Narain Singh to give property yielding Rs. 500 per mensem as profits, i.e., Rs. 6,000 per annum for the maintenance of his two brothers as per detail given below. He should separate such property from his management and place it in charge of the Babus aforesaid who shall be responsible for payment of Government Revenue and other zamindari matters in respect of the property aforesaid."

He then proceeds to provide for the male descendants of his sons and for the construction of a residence for his younger sons. The will then proceeds as follows :

"In view of the fact that for various reasons I could not make proper arrangements for the education and future maintenance of Babu Parchand Bir Singh, I have considered it proper and have after full consideration come to the decision that in addition to the babuai rights of maintenance mentioned above, property yielding Rs. 100 per mensem as profits should further be allotted to him subject to all the conditions of babuai rights. I hereby direct that when Babu Parchand Bir Singh separates, Lal Jwaleshwari Prasad Singh should give him property yielding profits to the extent noted above. At the time of allotment of this property also, all the conditions relating to the selection of property as mentioned above should be borne in mind. I have, therefore, executed these few presents by way of a will so that it may serve as evidence and be of use when required.

Written on 16th July, 1927.

Details of maintenance allowance amounting to Rs. 500 per mensem which comes to Rs. 6,000 per annum.

Babu Parchand Bir Singh—Rs. 300 per mensem.

Babu Bijai Bir Singh—Rs. 200 per mensem."

At the date of the will and at his death the testator had three sons, the appellant, the respondent and Babu Bijai Bir Singh. The last-named is joined merely as a formal party interested under the will and is not otherwise concerned in these proceedings.

Differences having arisen between the parties, the respondent separated from the appellant in 1934, and the respondent thereupon claimed from the appellant the sum of Rs. 2,500 mentioned in the will and in effect a decree awarding possession over such villages as would yield an income of Rs. 400 a month. No point arises as to the Rs. 2,500, but the appellant contended that he was liable to give possession of property producing Rs. 300 a month only.

A further dispute arose between the parties which turned upon the effect of section 73 of the Agra Tenancy Act (III of 1926), the Act which was applicable at the date of the partition.

That section enacts :

"When for any cause the local Government or any authority empowered by it, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land or any portion thereof, a collector . . . may order that the rents of the tenants holding such land or any portion thereof . . . shall be remitted or suspended for the period of such remission or suspension of payment of revenue to an amount which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which payment has been so remitted bears to the whole of the revenue payable in respect of the land."

The exact date at which the parties separated does not appear in the record but it does appear that certain remissions of rent had been made before the date of the partition and that further remissions were made after that date. The appellant claimed that in allotting villages to answer the provisions of the will, the income should be calculated as if the original rents stood and no remissions had been made, whereas it was held by the High Court and is contended by the respondent in this appeal that the income must be calculated as at the date of the partition, that a rise or fall or the possibility of a future rise or fall in the rents after that date will not diminish or increase the respondent's obligation.

In order to secure the rights which the respondents claimed were his, he instituted the present suit on the 9th April, 1934, in *forma pauperis*, in the Court of the Subordinate Judge of Basti.

In that suit the learned Subordinate Judge delivered judgment on the 1st June, 1936, and issued a decree against the appellant holding that the respondent was entitled to have possession of certain properties of the value of Rs. 4,800 a year, but in directing the properties which were to be taken, the learned Subordinate

Judge calculated the income to be derived from them as if no remissions had been made under the provisions of section 73 of the Tenancy Act of 1926.

Both parties appealed from this decree, the respondent claiming that the remissions made under the Act should have been taken into consideration and that the properties from which the income was to be derived must be of the value of Rs. 400 a month as at the date of partition, even though the rental had at that time been reduced. The appellant on the other hand maintained, as he had maintained below, that the respondent was entitled to possession of lands producing Rs. 300 a month only and that the rental value must be calculated as if no remissions had been made.

Both appeals were from the same decree but were separate appeals separately brought; the question at issue in the one was different from that in the other, different relief was sought and different grounds of objection given. The appellant's appeal was numbered 228 of 1936 and the respondent's 276 of the same year.

One judgment only was pronounced in the two appeals. In the result the appellant's appeal (No. 228 of 1936) was dismissed with costs, that of the respondent (No. 276 of 1936) allowed and the order of the Civil Judge modified.

In the latter appeal a separate decree was pronounced and it was ordered that the decree of the Subordinate Judge be modified and that a decree should be passed in favour of the respondent for the recovery of Rs. 10,293-0-0 together with interest at the Court rate, and that in so far as the claim for possession was concerned, the case should be remanded to the Court of the Subordinate Judge with direction to give the respondent after investigation a decree for possession of property which in 1934 yielded an actual income of Rs. 400 a month and to base the income upon actual realisation after making provision for remissions.

It was further ordered that if the respondent had already realised any sum in execution of his decree, the appellant should be credited with that amount and with Rs. 1,000 in respect of collecting charges. The respondent was also given a stated sum for costs.

The question of the amount per mensem to which the respondent is entitled under the terms of the will is one of some difficulty and if it were open to the appellant would require careful consideration by the Board.

But their Lordships do not think it is open.

They would point out that the only application for leave to appeal is against the decree in the First Appeal No. 276 of 1936 and that paragraphs 3, 4 and 5 of the petition are as follows:—

"3. That the plaintiff filed appeal, First Appeal No. 276 of 1936 in this Court against that portion of the decree which awarded him possession over 7 villages only on the ground that the trial Court should have taken into consideration the fact, that remissions of rent had taken place and therefore the net income of the villages decreed was less than Rs. 4,800—0—0 a year.

"4. That the Court decreed the plaintiff's appeal and directed that a decree be given to the plaintiff over villages which after taking into account the remissions yield a net income of Rs. 4,800—0—0 a year.

"5. That the value of the subject-matter of the suit in the Court of the first instance and the value of the subject-matter in dispute on appeal to His Majesty in Council is upwards of Rs. 10,000, that the decree sought to be appealed from, does not affirm the decree of the Court below and that the appeal involves substantial questions of law."

Moreover the grounds of appeal are solely concerned with the question of the remissions and no complaint is made or reversal sought of the decree which dismissed the appellant's appeal and awarded Rs. 400 and not Rs. 300 a month to the respondent.

In these circumstances, having regard to the practice and the terms of Order 45, rules 1 to 5 of the Code of Civil Procedure, their Lordships do not think that this point is open to the appellant or that they would be justified in permitting it to be raised. Accordingly they would dismiss the appellant's appeal in this matter.

So far as the remissions are concerned, the will specifically states that if the respondent or his brother wish to become separate or live separately, they should be entitled to babuai rights and it should be the duty of the appellant to give property yielding Rs. 500 per mensem for the maintenance of the two brothers "as per detail given below." The will goes on to direct that the appellant should separate such property from his management and place it in charge of the respondent and his brother who should be responsible for Government revenue and zamindari matters and that the Babus might on removal of the name of the Rajah for the time being have their names recorded in the *khewat*.

At a later stage the will contains the provision for an additional Rs. 100 a month to be given to the respondent in addition to the sum of Rs. 300 out of the 500 per mensem allocated to him.

In their Lordships' view, this language clearly indicates an intention on the part of the testator that the amount of income which the property to be given would produce was to be calculated with reference to the date at which the separation took place. If there were any doubt in the matter, it would, in their Lordships' opinion be resolved by the terms to be found later in the will where it is said that the testator and the appellant intend to settle certain villages set out below according to the Agra Estate Act, that for this reason it was not possible to apportion any particular property for the Babus, that the testator entrusted this duty to the appellant who might out of the property of the Raj set apart property yielding profits to the extent noted below, when any of the Babus separate.

Their Lordships cannot read these provisions in any other sense than that the property was to be separated when the respondent should elect to live separately and the income which it would yield was to be ascertained at the moment of separation.

It was argued on behalf of the appellant that remissions were temporary only and the revenue and rental might at any future time be increased to its original amount and that in that case the respondent would gain an unjustified and unintended increase of income, beyond that specified in the will. Without pronouncing an opinion on this matter, and assuming it to be true that the rental might be increased at some future time to its original figure, their Lordships hold the provisions of the will clearly to indicate that property which produces the specified income at the date of the separation is to be transferred—the appellant taking the risk of a future rise and the respondent of a further remission. The obligation is not simply to provide an income of Rs. 400 a month, but to transfer property producing that income. In default of any other indication their Lordships are of opinion that this means property producing that income at the date when the duty to transfer arises.

In their Lordships' view, the decree of the High Court is right and should be confirmed with a slight modification for clarity's sake only.

They will accordingly humbly advise His Majesty that there is no appeal before them as to the question whether under the terms of the will the respondent is entitled to property producing an income of Rs. 300 a month only and not to property producing Rs. 400 a month and that no relief can be granted to the appellant in this respect. They will further humbly advise His Majesty that the appellant's appeal be dismissed with costs save that there be substituted in the wording of that decree the words "property which at the date of the partition (9th April, 1934) yielded an actual income of Rs. 400—0—0 a month" in the place of the words "property which in 1934 yielded an actual income of Rs. 400—0—0 a month."

The appellant must pay the costs of the appeal.

V.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Manickam Chettiar

Appellant*

v.

Ramaswami Chettiar and another

Respondents.

Civil Procedure Code (V of 1908), section 48—Application to transfer decree to another Court for execution within the twelve years period fixed by section 48—Order transferring decree passed after expiry of such period—Execution petition presented to transferee Court in the meanwhile and within the period fixed by section 48—Barred under section 48—‘Fraud or force’ in sub-section 2 (a) of section 48—Meaning of judicial constraint imposed by a stay order, not covered by the words—Madras Agriculturists’ Relief Act (IV of 1938), sections 19 and 20—Amendment of the decree under section 19—Does not afford a fresh starting point for purposes of the twelve years rule under section 48, Civil Procedure Code—Order for stay under section 20—Period of stay, if can be excluded under section 15, Limitation Act.

A decree was obtained on the 18th March, 1930. On the 17th April, 1941, the judgment-debtor obtained a stay under section 20 of the Madras Agriculturists’ Relief Act and in subsequent proceedings under section 19 of that Act, the decree was scaled down. On the 16th March, 1942, i.e., two days prior to the expiry of the period fixed in section 48, Civil Procedure Code, the decree-holder applied to the Court which passed the decree for transfer of the decree to the Court of M for execution. This application was ordered on the 20th March, 1942, i.e., after the expiry of the 12 years period fixed in section 48 and the records were received by the Court of M, sometime later on the 28th March, 1942. But the decree-holder had in the meanwhile filed an execution petition in the Court of M on the 18th March, 1942, in anticipation of the transfer of the decree. It was contended that the execution petition was not barred under section 48, Civil Procedure Code, that the amendment of the decree under the Madras Agriculturists’ Relief Act furnished a fresh starting point of limitation and that the period of stay under that Act could be excluded under section 15, Limitation Act.

Held, that during the pendency of the transfer application, the only Court which had jurisdiction to execute the decree was the trial Court. Jurisdiction passed to the transferee Court only by the order of transfer and such an order does not date back to the date of the application. Presentation of the execution petition to the Court of M which had no jurisdiction to receive it was not a presentation at all and the presentation could not be deemed to have taken place before the date when the executing Court acquired jurisdiction to receive the petition.

The execution petition to the Court of M could not be regarded as a continuation of the transfer application in the trial Court because it was clearly a fresh proceeding praying for different reliefs.

The amendment of the decree under the provisions of the Madras Agriculturists’ Relief Act does not give a fresh starting point for the purpose of the twelve years rule under section 48, Civil Procedure Code.

The words ‘fraud or force’ in sub-section 2 (a) of section 48 contemplate some act of violence or deceit at the instance of an interested party whereby the decree-holder is prevented from executing his decree and would not cover the judicial constraint imposed by the order of stay under section 20, Madras Agriculturists’ Relief Act.

The period of stay under the Madras Agriculturists’ Relief Act cannot be excluded under section 15, Limitation Act, for the purpose of calculating the twelve years term under section 48, Civil Procedure Code.

The petition in the circumstances was barred under section 48, Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge, Mayavaram, in A. S. No. 91 of 1942, preferred against the order of the Court of the District Munsiff of Mayavaram dated 17th August, 1942, and made in the unfilled E. P. S. C. No. 368 of 1930 on the file of the Court of Small Causes, Kumbakonam.

D. Ramaswami Aiyangar for Appellant.

K. S. Sankara Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The appellant obtained a decree on the 18th March, 1930, for a sum of Rs. 821. On the 17th April, 1941, the debtor obtained a stay under section 20 of Madras Act IV of 1938 and in subsequent proceedings under section 19 of that Act, the decree was scaled down to an amount of Rs. 307. On the 16th March, 1942, i.e., two days before the expiry of the twelve years period fixed in section 48 of the Civil Procedure Code, the appellant applied to the decree Court, that is to say, the Court of the Subordinate Judge of Kumbakonam, for the transfer of the decree to the Court of the District Munsiff of Mayavaram for execution. This application was eventually ordered on the 20th March, 1942, i.e., after the twelve years period had expired. Meanwhile, however, the appellant, in anticipation

* A. A. O. N. 140 of 1943.

of this transfer order, had filed the present execution petition in the Court of the District Munsiff of Mayavaram on the 18th March, 1942. The papers were actually received at Mayavaram on the 28th March, and the petition was dismissed as being barred under section 48 of the Civil Procedure Code. The correctness of this order is now under consideration.

The appellant has raised a number of contentions. Firstly, he contends that the execution petition filed at Mayavaram on the 18th March, 1942, must be treated as having been presented on that date even though the decree had not yet been transferred to Mayavaram for execution, so that it cannot be said to be a fresh application presented after the expiration of twelve years from the date of the decree. The argument is that the section does not say "validly presented" or "presented to the proper Court." It seems to me that some such qualification must be implicit in the language and that it is impossible to contend that the presentation in a Court which has no jurisdiction is presentation at all. It is unthinkable that the decree-holder should be able to keep his decree alive by presentation of an execution petition in any Court regardless of its jurisdiction to execute the decree. I must hold that the mere handing in of this execution petition to a Court which had no jurisdiction to receive it, was not a presentation and that the presentation of the petition cannot be deemed to have taken place before the date when the executing Court had jurisdiction to receive it.

That the date of the order of transfer is the date with effect from which the transferee Court has jurisdiction has been held in *Ademma v. Venkatasubbayya*¹. It is suggested that the order of transfer must date back to the date of the application for transfer, so that the transferee Court would have jurisdiction even before the transfer was ordered. The contention is that it is a general rule of procedure that all judicial orders date back to the date of the initiation of proceedings. I am not aware of any such general rule. No doubt there are many classes of proceedings in which the final order is deemed to take effect from the date of the initiation of the proceedings; but when we are dealing with a question of jurisdiction, it seems to me that jurisdiction cannot be in abeyance, as it would be if its eventual exercise was to depend retrospectively upon some future order. During the pendency of the transfer application, I consider that the only Court which had jurisdiction to execute the decree was the trial Court. Jurisdiction passed to the transferee Court by the order of transfer and there is no basis for holding that this order dates back to the date of the application.

It is next argued that the amendment of the decree under section 19 of Madras Act IV of 1938 gives a fresh starting point not merely under Article 182 of the Limitation Act, but also for the purpose of section 48 of the Civil Procedure Code. This argument is reinforced by two rather conflicting lines of judicial reasoning. There is the decision of Horwill, J. in *Panya Jagannadham v. Andhavarappu Venkatapanna*², where it was held that for the purpose of continuing a pending execution petition, the decree amended under section 19 is the same decree and not a different decree; whereas in *Vikkara Velloodi v. Bankalath Avarankutti*³, the Bench dealing with the question of the appealability of a decree amended under sections 15 and 19 of Madras Act IV of 1938, emphasised the difference in the mode of calculation of the amount payable under the decree and held that for purposes of appeal, the amended decree must be regarded as a fresh decree. It seems to me apparent that the decree as amended under section 19 of Madras Act IV of 1938 may be regarded in one sense as the same decree and in another sense as a fresh decree. But the question of the application of section 48 to an amended decree is covered by the decision of the Full Bench in *Ramachandra Rao v. Parasuramayya*⁴, where it is pointed out that inasmuch as Article 182 of the Limitation Act providing a fresh starting point of limitation from the date of the amendment of the decree is subject to the provisions of section 48 of the Civil Procedure Code, there can be no exe-

1. (1933) 65 M.L.J. 137; I.L.R. 56 Mad. 692.

2. (1943) 2 M.L.J. 358.

3. (1942) 2 M.L.J. 237.

4. (1940) 1 M.L.J. 235; I.L.R. (1940) Mad. 349 (F.B.).

cution of a decree governed by section 48 when twelve years have passed from the date of the decree, whether amended or not. It is true that the Full Bench was concerned with an amendment made under section 152 of the Civil Procedure Code. But I can see no reason for applying a different rule to the case of an amendment made under section 19 of Madras Act IV of 1938. The decisions of this Court regarding the right of appeal against a decree as amended under the Civil Procedure Code have been relied on for the view that a decree as amended under section 19 of Madras Act IV of 1938 is separately appealable. Though no doubt the amendment under section 19 is frequently much more drastic than an amendment under section 152 of the Civil Procedure Code, it is for purposes of execution still the same decree as is shown by the provisions of section 19 itself, whereunder if the scaling down process wipes out the whole of the debt, the Court has to record satisfaction of the original decree and undoubtedly all payments made to the original decree are taken into consideration in the process of amendment. I am therefore of opinion that the decision in *Ramachandra Rao v. Parasuramayya*¹ governs the present case and that the amendment of the decree does not give a fresh starting point for the purpose of the twelve years rule under section 48 of the Civil Procedure Code.

The third argument is one which need not be considered at length. The contention is that the words "fraud or force" in sub-section 2 (a) of section 48 of the Civil Procedure Code would cover the judicial constraint imposed by the passing of the stay order. It seems to me manifest that this would be doing violence to the plain English of the section and that the words "fraud or force" contemplate some act of violence or deceit at the instance of an interested party, whereby the decree-holder is prevented from executing his decree and do not contemplate a mere judicial order restraining that execution.

Fourthly, it is contended that the execution petition in the Mayavaram Court can be regarded as a continuation of the transfer application in the Kumbakonam Court. This argument is reinforced by calling attention to the fact that the application to the Kumbakonam Court is drafted as an execution petition and not as a mere application. It seems to me to make no difference whether the petition to the Kumbakonam Court is called an execution petition or is called an application for transfer. In fact the relief sought was of necessity only a transfer of the papers to the Mayavaram Court, so that an execution petition could be filed there and the actual execution petition in the Mayavaram Court seeking to recover the decree amount by the attachment of particular properties is clearly a fresh proceeding which cannot be treated as a continuation of the merely ancillary proceeding in the trial Court. The decision in *Nilmoney Singh Deo v. Bireswar Banerjee*², is authority for this view.

Lastly it is contended that under section 15 of the Limitation Act the period of the stay under Madras Act IV of 1938 can be excluded for the purpose of calculating the twelve years term under section 48 of the Civil Procedure Code. This contention is negatived by the decision in *Subbarayan v. Natarajan*³, which has been followed by another Bench of this Court in *Tandavamurthi v. Durgamba*.⁴ No doubt the reasoning of one of the learned Judges in the former case has been criticised by the Bench which decided *Kalyanasundaram Pillai v. Vaidhilingam Vanniar*⁵, and a different view has been taken by a Full Bench of the Allahabad High Court in *Drigpal Singh v. Panchom Singh*.⁶ I am however bound by the decision in *Subbarayan v. Natarajan*³, and must hold that the period for which the stay continued cannot be excluded in calculating the twelve years period under section 48 of the Civil Procedure Code.

In the result, therefore, the appeal fails and is dismissed with costs. Leave refused.

V.S.

Appeal dismissed.

1. (1940) 1 M.L.J. 235 : I.L.R. 1940 Mad. 785.
349 (F.B.).

2. I.L.R. (1889) 16 Cal. 744.

3. (1922) 48 M.L.J. 168 : I.L.R. 45 Mad.

4. A.I.R. 1928 Mad. 1154.

5. I.L.R. (1939) Mad. 611.

6. I.L.R. (1939) All. 647 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

A. T. Ponnappa Chettiar and others

.. Petitioners*

v.

Bodappa Chettiar and others

.. Respondents.

Partnership Act (IX of 1932), section 69 (2)—Unregistered partnership—Dissolution—Suit by former partner for recovery of debts—Suit barred.

To permit an unregistered partnership to dissolve and one of the former partners to recover debts due to it would be to defeat the object of section 69 (2) of the Partnership Act.

Accordingly where an unregistered partnership was alleged to be dissolved and one of the former partners sued the defendants to recover debts due to the original firm claiming that under the terms of the dissolution he was entitled to sue for outstandings due to the partnership,

Held, that the suit was barred as registration of the firm was a condition precedent to the right to institute the suit.

Ponnuchami v. Muthusami, (1941) 2 M.L.J. 968, followed.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Vellore, in S. C. S. No. 389 of 1943.

T. R. Arunachalam for Petitioners.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The petitioners were defendants 1, 2 and 4 in a suit brought against them and the other members of their family by one Bodappa Chettiar for the price of goods sold and delivered to the defendants by an unregistered firm of which the plaintiff and one Jayarama Chetti were or had been partners. The goods were sold and delivered between 16th September, 1939, and 29th April, 1943. The defendants appeared and took the objection among others that the suit being one to recover a debt due to the partnership, was not maintainable under section 69 of the Partnership Act. Bodappa Chettiar promptly applied to the District Munsiff for leave to amend his plaint by stating that the said partnership had in fact been dissolved on 7th July, 1941, and that, under the terms of the dissolution he had become entitled to sue for outstandings due to the partnership. This amendment was allowed. The objection was again raised at the trial and was overruled by the District Munsiff on the ground that as the suit was, in effect, one by a plaintiff who had become entitled under the deed of dissolution to sue, it was not affected by the prohibition of sub-section (2) of section 69 of the Partnership Act.

There is no question that the partnership was never registered. In my opinion, The District Munsiff was wrong. The suit as instituted was for the recovery of a debt due to an unregistered partnership and was therefore barred. The section has been strictly interpreted and it was held in *Ponnuchami v. Muthusami*¹ that the registration of a firm is a condition precedent to the right to institute the suit and that the Court has no jurisdiction to proceed with the trial when the condition precedent has not been fulfilled. In my view, to permit an unregistered partnership to dissolve and one of the former partners to be able to recover debts due to the partnership would be to defeat the object of the section. There would be nothing then to prevent unscrupulous persons from setting up any unregistered partnership and periodically bringing about dissolution in order that moneys which were due to them, might be recovered and then setting up the partnership once more. In my opinion this suit should have been dismissed.

This petition is therefore allowed with costs. It is unfortunate that no one appears for the respondents but this point was the principal one set out in the written statement and argued on behalf of the defendants in the lower Court and the petition is therefore allowed with costs here and below.

K. C.*

Petition allowed.

* C. R. P. No. 369 of 1944.

27th October, 1944.

1, (1941) 2 M.L.J. 968.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Pazhaveettil Chekkara Kunhi Kannan

... *Appellant**

Elamankandi Kinattumkara Chappan

... *Respondent.*

Costs—Application for security for costs—Case printed—Appeal ready for hearing—Security not to be ordered.

Promptness is the essence of an application for security for costs.

Where long after the records in the appeal to the High Court had been printed and the case itself had appeared in the rough list, the decree-holder applied for an order for security for costs,

Held, that in the circumstances no order for security for costs can be granted.

• Appeal under Clause 15 of the Letters Patent against the order of Happell, J. dated 30th August, 1944 and made in C. M. P. No. 2975 of 1944—petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order calling upon the respondent therein, appellant in Appeal No. 119 of 1943 preferred to the High Court against the decree of the Court of the Subordinate Judge, Tellicherry, in O. S. No. 13 of 1942 to furnish security for the costs of the petitioner (the first respondent in the said appeal) in the lower Court as well as the costs of the appeal in the High Court in the sum of Rs. 1,000.

K. Kuttikrishna Menon and A. Atchuthan Nambiar for Appellant.

S. Venkatachala Sastri for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from an order of Happell, J., directing that the appellant should furnish security for the costs of the respondent in Appeal No. 119 of 1943 of this Court. The appellant's complaint is that the application for security for costs was made at a very late stage and on the accepted principle that promptness is the essence of such an application, the learned Judge should have refused it. We consider that this argument is well founded.

The appeal was filed on the 22nd February, 1943, and was admitted on the 18th March, 1943. The respondent was served in due course. The application for an order for security for costs was filed on the 25th July, 1944, by which time the record had been printed and the case had appeared in the rough list, which meant that all costs in connection with the printing of the record had been incurred.

The learned Judge, in passing the order for security for costs had regard to what had happened in an application made by the respondent for the execution of the costs awarded to him in the trial Court. This application was filed in the month of October, 1943. The judgment-debtor contended that he was possessed of no means. His statement was disbelieved and the Subordinate Judge who heard the application for execution held that he had sufficient money to pay off the amount due to the decree-holder. Accordingly he directed a warrant to be issued for the arrest of the judgment-debtor. It was not executed because he could not be found and on the 10th January, 1944, the Subordinate Judge dismissed the application for execution.

If the decree-holder had then applied to this Court for an order for security for costs, he would undoubtedly have got it and rightly so, but he did not apply until six months later. The Court closed for the Long Vacation at the end of April, 1944, and the decree-holder had ample time in which to make the application before the vacation commenced. He took no steps until the case was ready for hearing. In these circumstances we consider that he is precluded from getting an order for security for costs. He has only himself to blame for the present situation.

The appeal must be allowed with costs here and before Happell, J.

K.C.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Chellakani Sahib and another

Petitioners*

Madras Gaming Act (III of 1930), section 9—Gist of offence under—"Common gaming house"—What constitutes—Presumption that place was used as common gaming house from presence of cards, dice, etc.—When arises.

For an offence under section 9 of the Madras Gaming Act to be completed the accused persons must have been found gaming or present for the purpose of gaming in a "common gaming house"; and for a room to be a "common gaming house" within the meaning of section 3 the cards, dice or other instruments of gaming must be kept or used for the profit or gain of the person owning or occupying the room and in the absence of evidence as to that the accused persons cannot be convicted. A presumption that the place was used as a common gaming house may be drawn from the presence of the cards, dice or other instruments of gaming at the place, only where a warrant had been issued under section 5 of the Act by a Magistrate who has reason to believe that the place was used as a common gaming house.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the first Class Bench of Magistrates of Kokirakulam in B. C. No. 3014 of 1943.

A. S. Sivakaminathan for Petitioners.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted of an offence under section 9 of the Madras Gaming Act and sentenced to a fine of Rs. 10 and to seven days' simple imprisonment in default of payment.

In my opinion the conviction cannot be sustained. It may be conceded that the petitioner was found with others playing cards for money in a room belonging to a dancing girl. For an offence under section 9 to be completed, however, the accused person must have been found gaming or present for the purpose of gaming in a common gaming house and for a room to be a common gaming house within the meaning of section 3 of the Madras Gaming Act, the cards, dice or other instruments of gaming must be kept or used for the profit or gain of the person owning or occupying the room. Section 6 provides that if a warrant has been issued under section 5, the cards, dice or other instruments of gaming found at the place shall be evidence that such place is used as a common gaming house. In the present case, the Bench Magistrates do not seem to have drawn the presumption referred to in section 6. After referring to an argument stressed for the defence that the Sub-Magistrate did not issue a separate warrant under section 5 of the Gaming Act, they say that no doubt that is true, but then go on to say that, in consideration of the specific evidence of P. Ws. 1 to 3 and the evidence of P. W. 4, it was clearly established that the house was a common gaming house. In my opinion the evidence of these witnesses does not establish that the room was a common gaming house since in the absence of the presumption under section 6 the evidence does not prove that the instruments of gaming were being kept for the profit or gain of the person owning the room. Moreover, it seems to me clear that the Magistrates, although I do not agree with their appreciation of the evidence, were right in not relying on the presumption that in appropriate circumstances may be drawn under section 6. All that the Sub-Magistrate has done in this case, as appears from Ex. A is to write 'permitted' on the side of an application for permission to search the premises concerned in this case by the Sub-Inspector of Police. Under section 5, the Magistrate must have reason to believe that a place is used as a gaming house before the warrant referred to in section 5 is issued; and Ex. A affords no guarantee that in the present case the Magistrate applied his mind to the question and so had reason to believe that a warrant should be issued.

The conviction is therefore set aside and the appeal is allowed. The fine, if paid, will be refunded.

K.S.

Appeal allowed.

[END OF VOL. 1944—II.]

* CrI. R. C. No. 571 of 1944.
(CrI. R. P. No. 543 of 1944).

26th October, 1944.

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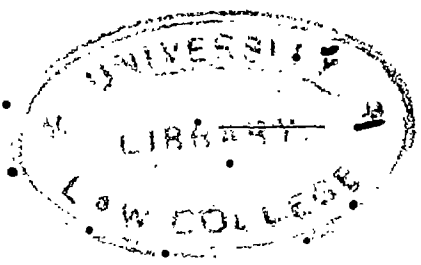
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SUPPLEMENT.

MADRAS HOUSE RENT CONTROL ORDER, 1941.

(As amended up to July, 1944.)

No. 574.

In exercise of the powers conferred by clause (bb) of sub-rule (2) of rule 81 of the Defence of India Rules which have been delegated by the Central Government to the Provincial Government, His Excellency the Governor of Madras is hereby pleased to pass the following order:—

1. (1) This order may be called THE MADRAS HOUSE RENT CONTROL ORDER, 1941.

(2) It shall come into force at once.

(3) It extends to such areas within the province of Madras as are notified in this behalf by the Provincial Government.

2. In this Order, unless there is something repugnant in the subject or context;—

(1) "Controller" means the Revenue Divisional Officer of the Revenue Division in which the area to which this order is extended is situated, [and in the City of Madras, the Personal Assistant to the Collector of Madras].

²[(2) "house" means any building or part of a building or hut let or to be let separately for residential purposes, and includes—

(a) the garden, grounds and out-houses (if any) appurtenant to such building or part of a building or hut and

(b) any furniture supplied by the landlord for use in such building or part of a building or hut;] ³[*]

(3) "landlord" includes the person who is receiving or is entitled to receive the rent of a house whether on his own account or on behalf of himself and others or as an agent or trustee, or who would so receive the rent or be entitled to receive the rent if the house were let to a tenant.

⁴["tenant" means any person by whom or on whose account rent is payable for a house, and includes a person continuing in possession after the termination of a tenancy in his favour.]

3. When, on a written complaint or otherwise, the Controller has reason to believe that the rent of any house within the local limits to which this Order applies, is excessive, he shall hold a summary enquiry and record a finding.

4. If, on a consideration of all the circumstances of the case, including any amount paid or to be paid by the tenant by way of premium or any other like sum in addition to rent, the controller finds that the rent of the house is excessive, he shall determine the fair rent to be charged for the house.

5. In fixing the fair rent under clause (4) the Controller shall have due regard to the prevailing rates of rent for the same or similar accommodation in similar circumstances during the twelve months prior to the 1st April, 1940, and to the rental value as entered in the property tax assessment book relating to that period of the local municipality or the local board, as the case may be, and in the case of a house which has been constructed after that date also to any general increase in the cost of sites and building construction.

6. When the Controller has determined the fair rent of a house—

[(a) the landlord shall not claim or receive any premium, advance or other like sum in addition to rent, or any rent in excess of such fair rent;]⁵

(b) any agreement ⁵[for the payment of any sum in addition to rent or of rent] in excess of such fair rent shall be null and void in respect of such excess and shall be construed as if it was an agreement for payment of the said fair rent;

1. Added by G.O. No. 394—Fort St. George, dated 11th July, 1944.

George Gazette, 18th August, 1942, p. 831.

4. Added by *ibid*.

2. Substituted by G.O. Ms. No. 2379, Fort St. George Gazette, 13th June, 1944, part I, Supp. p. 2 (Dev. 3rd June, 1944).

5. Substituted, inserted and added by G.O. No. M-271, dated 31st August, 1942, Fort St. George Gazette, 15th September, 1942, Pt. I, Supp., p. 1.

3. "and" omitted by G.O. Ms. 2882 Dev. 4th July, 1944. Fort St. George Gazette,

(c) any sum in excess of such fair rent paid whether before or after the commencement of this order in respect of residence after the commencement of this order shall be refunded to the person by whom it was paid, or at the option of such person, otherwise adjusted.

¹[6-A. If the landlord is convicted of charging any sum in excess of the fair rent, the Controller may issue an order in writing—

(i) prohibiting the landlord from granting or renewing a lease of any or all of his houses or any portion thereof situated in the areas to which this order applies, after the expiry of a period of one month from the date on which the order is communicated to him, or

(ii) directing that he shall grant or renew such lease only to such persons as may be specified by the Controller in the order or in any subsequent order in writing.]

7. (a) After the commencement of this order an increase in rent shall be permissible only where some addition improvement or alteration, not included in necessary repairs or repairs which are usually made to houses in the local area, has been carried out at the landlord's expense since the rent was fixed.

(b) Any such increase in rent shall not exceed $7\frac{1}{2}$ per cent. per annum on the cost of such addition, improvement or alteration and shall not be chargeable until such addition, improvement or alteration has been completed.

(c) Any dispute, between the landlord and the tenant in regard to any increase of rent claimed under this clause shall be decided by the Controller.

²[7-A. (1) A tenant in possession of a house shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy except in accordance with the provisions of this clause.

(2) A landlord wishing to evict a tenant in possession shall apply to the controller for a direction in that behalf. If the controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied.

(i) that the tenant has not paid, and is not ready and willing to pay the rent due in respect of the period before such application; or

(ii) that the tenant is not ready and willing to pay the fair rent of the house for such period thereafter as he may continue to be in possession; or

(iii) that the tenant has, without the consent of the landlord, sub-let the entire house or used it for a purpose other than that for which it was leased; or

(iv) that the landlord was at no time during the twelve months immediately preceding the date of his application residing within the limits of the city, town or village in which the house in question is situated, that it is essential in the public interest that he should take up residence in such city, town or village and that he is unable to secure other suitable accommodation,

the controller shall make an order directing the tenant to put the landlord in possession of the house, and if the controller is not so satisfied, he shall make an order rejecting the application.

(3) Every order under sub-clause (2) directing a tenant to put the landlord in possession of a house shall, subject to the provisions of clause (3), be final. Such order shall be executed.

(i) in the City of Madras by the Principal Judge of the Madras City Civil Court, and

(ii) elsewhere by the Subordinate Judge (or if there is more than one Subordinate Judge by the Principal Subordinate Judge) having original jurisdiction over the area in which the house is situated or if there is no such Subordinate Judge by the District Judge having such jurisdiction, as if it were a decree by him.

(4) A landlord evicting a tenant in pursuance of an order of the controller under sub-clause (2) (iv) shall not let the house or any part thereof to any person other than the original tenant except with the written permission of the controller.

(5) The controller shall summarily reject any application under sub-clause (2) which raises substantially the same issues as have been finally decided under the provisions of this Order in a former proceeding between the same parties or between parties under whom they or any of them claim.

(6) Where an application under sub-clause (2) for evicting a tenant after the termination of the tenancy has been rejected by the controller the tenancy shall be deemed to have been extended for an indefinite period on the same terms and conditions as before, and

1. Vide foot-note 5, page 1.

2. Rule 7-A. Substituted by G.O. Ms. No. 2882, Dev. dated 4th July, 1944, Fort St.

George, Gazette, Pt. I, R.S. p. 2, dated 11th July, 1944.

shall not be terminable by the landlord except on one or more of the grounds mentioned in sub-clause (2).]

8. (1) Any person aggrieved by an order of the controller may, within fifteen days from the date on which the order is communicated to him, present an appeal in writing to the Collector of the district, [or to the Collector of Madras, as the case may be.]

(2) The Collector shall then send for the record of the case from the controller and, after perusing such record and, if necessary, after making such further enquiry as he thinks fit either personally or through the controller, shall decide the appeal.

(3) The decision of the Collector and subject only to such decision, an order of the controller, shall be final [and shall not be liable to be called in question in any Court of Law.]

Extension of the Madras House Rent Control Order.

No. 575.

In exercise of the powers conferred by sub-clause (3) of clause (1) of the Madras House Rent Control Order, 1941, the Provincial Government are pleased to extend the said Order to the areas mentioned below:—

- | | | |
|-----------------------|---|--|
| The Nilgiri district. | { | (1) Area within the limits of the Ootacamund Municipality. |
| | { | (2) Area within the limits of the Coonoor Municipality. |
| | { | (3) Area within the limits of the Wellington Cantonment. |
| Madura district. | { | (4) Area within the limits of the Kodaikanal Municipality. |

Fort St. George, September 4, 1941.

(G. O. Ms. No. 1609, Development.)

In exercise of the powers conferred by sub-clause (3) of clause (1) of the Madras House Rent Control Order, 1941, the Provincial Government are pleased to extend the said Order to the areas mentioned below:—

The Nilgiri district—

- (1) Area within the limits of the Kotagiri panchayat.
- (2) Area within the limits of the revenue village of Ketti.
- (3) Area within the limits of the revenue village of Jagathala.
- (4) Area within the limits of the revenue village of Hubathalai.

Salem district—

- (5) Area within the limits of the Yercaud panchayat. [*Fort St. George Gazette, 9th September, 1941, Part I, page 1041.*]

Fort St. George, March 6, 1942.

(G. O. Ms. No. 490, Development.)

In exercise of the powers conferred by sub-clause (3) of clause (1) of the Madras House Rent Control Order, 1941, His Excellency the Governor of Madras is hereby pleased to extend the said order to the areas of the Province of Madras to which it has not already been extended except the City of Madras. [*Fort St. George Gazette, dated 17th March, 1942, Part I, page 268.*]

Fort St. George, August 15, 1942.

(G. O. Ms. No. M-229, Development.)

No. 393.

In exercise of the powers conferred by sub-clause (3) of clause (1) of the Madras House Rent Control Order, 1941, His Excellency the Governor of Madras is hereby pleased to extend the said Order to the City of Madras. [*Fort St. George Gazette, dated 18th August, 1942, Part I, page 831.*]

1. Added by G.O. No. 394, *Fort St. George Gazette*, dated 18th August, 1942, p. 831.

2. Substituted by G.O. No. 394 dated 3rd December, 1943.

The following Bill, together with the Statement of Objects and Reasons, is published for the purpose of eliciting opinion. Notice is hereby given that the said Bill will be considered on or after the 1st September, 1944, and that any objection or suggestion which may be received with respect thereto before the said date by the Secretary to the Government of Madras in the Revenue Department will be considered.

A BILL FURTHER TO AMEND THE MADRAS ESTATES LAND ACT, 1908.

WHEREAS it is expedient further to amend the Madras Estates Land Act, 1908, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title. 1. This Act may be called THE MADRAS ESTATES LAND (AMENDMENT) ACT, 1944.

2. (1) In sub-clause (d) of clause (2) of section 3 of the Madras Estates Land Act, 1908, Explanations (1) and (2) shall be renumbered as Explanations (2) and (3) respectively and the following shall be inserted as Explanation (1), namely:—
Amendment of section 3, Madras Act I of 1908.

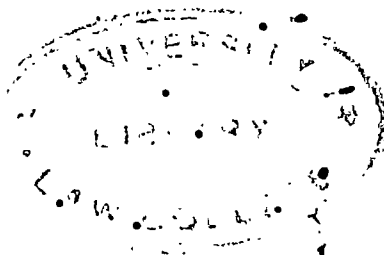
“Explanation.—(1) Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service tenure or been reserved for communal purposes or the like.”

(2) The amendment made by sub-section (1) shall be deemed to have had effect as from the date on which the Madras Estates Land (Third Amendment) Act, 1936, came into force and the said amendment shall be read and construed accordingly for all purposes.

Saving. 3. Nothing contained in this Act shall be deemed to invalidate any decree or order of a Court which became final before the passing of this Act.

STATEMENT OF OBJECTS AND REASONS.

Under section 3 (2) (d) of the Madras Estates Land Act, 1908, as amended by the Madras Estates Land (Third Amendment) Act, 1936, an inam village of which the grant was made, confirmed or recognized by the British Government is an estate. In a recent case the Madras High Court held that unless the grant was of a whole village it will not be an estate within the meaning of the section. In many cases, although the grant was expressed to be of a village, certain small areas therein, which were already enjoyed on service tenure and the like, were not included in the grant. Such villages were, however, treated as estates and the ryots therein were regarded as having acquired permanent rights of occupancy. In order to protect their rights it is proposed to amend section 3 (2) (d) so as to make it clear that inams of the kind referred to above are estates within the meaning of that section. Retrospective effect is proposed to be given to the amendment as from the commencement of the Madras Estates Land (Third Amendment) Act, 1936, by which section 3 (2) (d) was inserted in the main Act.



THE INDIA ACTS
AND
THE MADRAS ACTS
1944



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INDIA ACTS, 1944.

• THE CENTRAL EXCISES AND SALT ACT, 1944.

ACT No. I of 1944.

[24th February, 1944.]

An Act to consolidate and amend the law relating to central duties of excise and to salt.

WHEREAS it is expedient to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in British India and to salt;

It is hereby enacted as follows:—

CHAPTER I.

Short title, extent and commencement.

1. (1) This Act may be called THE CENTRAL EXCISES AND SALT ACT, 1944;

(2) It extends to the whole of British India;

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "broker" or "commission agent" means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others;

(b) "Central Excise Officer" means any officer of the Central Excise Department, or any person (including an officer of the Provincial Government) invested by the Central Board of Revenue with any of the powers of a Central Excise Officer under this Act;

(c) "curing" includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture;

(d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt;

(e) "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;

(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and

(i) in relation to tobacco includes the preparation of cigarettes, cigars, cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff; and

(ii) in relation to salt, includes collection, removal, preparation, steeping, evaporation, boiling, or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre, the separation of salt from earth or other substance so as to produce alimentary salt, and the excavation or removal of natural saline deposits or efflorescence; and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those goods are intended for sale;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

(i) "saltpetre" includes *rasi*, *sajji*, and all other substances manufactured from saline earth, and *kharium* and every form of sulphate or carbonate of soda;

(j) "salt factory" includes—

(i) a place used or intended to be used in the manufacture of salt and all embankments, reservoirs, condensing and evaporating pans, buildings and waste places situated within the limits of such place; as defined from time to time by the Collector of Central Excise;

(ii) all drying grounds and storage platforms and storehouses appertaining to any such place;

(iii) land on which salt is spontaneously produced;

and a "private salt factory" is one not solely owned or not solely worked by the Central Government;

(k) "wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale.

CHAPTER II.

LEVY AND COLLECTION OF DUTY.

3. (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in British India, and a duty on salt manufactured in, or imported by land into any part of British India as, and at the rates, set forth in the First Schedule.

Duties specified in the First Schedule to be levied.

(2) The Central Government may, by notification in the official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force;

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

4. Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement or deduction whatever except trade discount and the amount of duty then payable.

Determination of value for the purposes of duty.

Power of Central Government to impose Customs duty on goods mentioned in the First Schedule.

5. The Central Government may, by notification in the official Gazette, impose on any excisable goods other than salt brought into British India from the territory of any Indian State, not being territory which has been declared under section 5 of the Indian Tariff Act, 1934 (XXXII of 1934), to be foreign territory for the purposes of that section, a duty of customs equivalent to the duty imposed by this Act on the like goods produced or manufactured in British India.

Certain operations to be subject to licence.

6. The Central Government may, by notification in the official Gazette, provide that, from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under this Act, engage in—

(a) the production or manufacture or any process of the production or manufacture of any specified excisable goods or of saltpetre or of any specified component parts or ingredients of such goods or of specified containers of such goods, or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any excisable goods specified in this behalf in Part A of the Second Schedule.

Form and conditions of licence.

7. Every licence under section 6 shall be granted for such area, if any, for such period, subject to such restrictions and conditions, and in such form and containing such particulars, as may be prescribed.

8. From such date as may be specified in this behalf by the Central Government by notification in the official Gazette, no person shall, except as provided by rules made under this Act, have in his possession any excisable goods specified in this behalf in Part B of the Second Schedule in excess of such quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.

Restriction on possession of excisable goods.

Offences and Penalties.

9. Whoever commits any of the following offences, namely:—

(a) contravenes any of the provisions of a notification issued under section 6 or of a rule made under clause (iii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section;

shall, for every such offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

10. Any Court trying an offence under this Chapter may order the forfeiture to His Majesty of any goods in respect of which the Court is satisfied that an offence under this Chapter has been committed, and may also order the forfeiture of any receptacles, packages or coverings in which such goods are contained and the animals, vehicles, vessels or other conveyances used in carrying the goods, and any implements or machinery used in the manufacture of the goods.

11. In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central Board of Revenue to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land-revenue.

12. The Central Government may, by notification in the official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3.

CHAPTER III.

POWERS AND DUTIES OF OFFICERS AND LANDHOLDERS.

13. (1) Any Central Excise officer duly empowered by the Central Government in this behalf may arrest any person whom he has reason to believe to be liable to punishment under this Act.

(2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.

14. (1) Any Central Excise officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure shall be applicable to requisitions for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code.

15. All officers of Police and Customs and all officers of Gov
Officers required to assist collection of land-revenue, and all vil
Central Excise Officers. empowered and required to assist the
in the execution of this Act.

16. Every owner or occupier of land, and the agent of any
in-charge of the management of that
Owners or occupiers of land to report manufacture of reasonable excuse be bound to give
of contraband excisable goods. facture to a Magistrate, or to an officer
Customs, Police, or Land Revenue I
the fact comes to his knowledge.

17. Any owner or occupier of land, or any agent of such own
of the management of that land, who
Punishment for conni- offence against the provisions of this A
vance at offences. thereunder shall for every such offer
imprisonment for a term which may e
with fine which may extend to five hundred rupees, or with both.

18. All searches made under this Act or any rules made the
made under this Act shall be carried
Searches and arrests how the provisions of the Code of Crimi
to be made. of 1898), relating respectively to sea
under that Code.

19. Every person arrested under this Act shall be forwarde
nearest Central Excise officer empow
arrested to a Magistrate, or, if the
Excise officer within a reasonable di
charge of the nearest police-station.

20. The officer-in-charge of a
any person is forwarded under sectio
him to bail to appear before the Ma
tion, or in default of bail forward
Magistrate.

21. (1) When any person is f
19 to a Central Excise officer empow
arrested to a Magistrate, the Cent
proceed to enquire into the charge a

(2) For this purpose the Central Excise officer may exercis
shall be subject to the same provisions as the officer-in-charge
exercise and is subject to under the Code of Criminal Procedure, I
investigating a cognizable case:

Provided that—

(a) if the Central Excise officer is of opinion that there is suffi
able ground of suspicion against the accused person, he shall eith
appear before a Magistrate having jurisdiction in the case, or for
such Magistrate;

(b) if it appears to the Central Excise officer that there is r
reasonable ground of suspicion against the accused person, he shall
son on his executing a bond, with or without sureties as the Central I
to appear, if and when so required before the Magistrate having
make a full report of all the particulars of the case to his official

Vexatious search, seizure, 22. Any Central Excise or c
etc. by Central Excise offi- powers under this Act or under the
cer. who—

(a) without reasonable ground of suspicion searches or car
house, boat or place;

(b) vexatiously and unnecessarily detains, searches or arre

(c) vexatiously and unnecessarily seizes the movable prop
pretence of seizing or searching for any article liable to confiscati

(d) commits, as such officer, any other act to the injury of ar
reason to believe that such act is required for the execution of his
shall, for every such offence, be punishable with fine which may
rupees.

Any person wilfully and maliciously giving false information
or a search to be made under this Act shall be punishable with fi

for his permission given to his superior officer in writing of his intention. If a magistrate be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to

CHAPTER IV.

TRANSPORT BY SEA.

When any excisable goods are carried by sea in the burden of three hundred and master of such vessel is in certain imprisonment for a term which with fine which may extend to both.

Exceptions:

25. Nothing in section

(a) any excisable goods covered by a permit granted Act;

(b) any excisable goods covered by a pass granted Board of Revenue may appoint in this behalf;

(c) such amount of excisable goods carried on board her crew or by the passengers or animals (if any) on board may from time to time exempt from the operation of section

26. When any officer empowered by the Central Board of Revenue has reason to believe from information taken down from such vessel liable to the penalties imposed on such vessel to be brought to and thereupon may—

(a) enter and search the vessel;

(b) require the master of the vessel to produce any document relating to the vessel or the cargo thereof;

(c) seize the vessel if the officer has reason to believe this Act, and cause it to be brought with its crew and cargo and

(d) where any excisable goods are found on board the vessel without a warrant any person on board the vessel whom he has authority to arrest under section 24.

27. Any master of a vessel refusing or neglecting to produce his papers when required under section 26, and any person assisting in the performance of his duties without a warrant, shall be liable to imprisonment for a term which may extend to six months or with fine not exceeding one thousand rupees, or with both.

28. (1) Every vessel (including all appurtenances) in which any excisable goods are carried so as to render such vessel liable to penalties under this Act on board such vessel and the master thereof who commits an offence under this Act shall be liable to confiscation on the orders of the officer empowered by the Government.

(2) Whenever any Customs-officer is satisfied that any article is liable to confiscation under this section he may seize such article, and shall cause the same to be taken to the superior officer for the information of the officer empowered by the Government under sub-section (1) and such officer may, if satisfied on such report, cause the article so seized to be confiscated, or impose a fine in lieu thereof not exceeding

(2) Every order passed in appeal under this section shall, subject to the power of revision conferred by section 36, be final.

Revision by Central Government.

36. The Central Government may on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any Central Excise officer or by the Central Board of Revenue, and from which no appeal lies, reverse or modify such decision or order.

CHAPTER VII.

SUPPLEMENTAL PROVISIONS.

Power of Central Government to make rules.

37. (1) The Central Government may make rules to carry into effect the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;

(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;

(iii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the bringing of excisable goods into British India from the territory of any specified Prince or Chief in India, or the transit of excisable goods from any part of British India to any other part thereof;

(iv) regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or manufacture and their transport to or from the premises of a licensed person, or a bonded warehouse, or to a market;

(v) regulate the production or manufacture, or any process of the production, or manufacture, the possession, storage and sale of salt, and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, or of any component parts or ingredients or containers thereof;

(vi) provide for the employment of officers of the Crown to supervise the carrying out of any rules made under this Act;

(vii) require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation;

(viii) provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses;

(ix) provide for the distinguishing of goods which have been manufactured under licence, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act;

(x) impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified;

(xi) require that excisable goods shall not be sold or offered or kept for sale in British India except in prescribed containers, bearing a banderol, stamp, or label of such nature and affixed in such manner as may be prescribed;

(xii) provide for the issue of licences and transport permits and the fees, if any, to be charged therefor:

Provided that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely:—

	Rs.
Licence to manufacture and refine saltpetre and to separate and purify salt in the process of such manufacture and refining	50
Licence to manufacture saltpetre	2
Licence to manufacture sulphate of soda (<i>Kharimun</i>) by solar heat in evaporating pans	10
Licence to manufacture sulphate of soda (<i>Kharimun</i>) by artificial heat	2
Licence to manufacture other saline substances	2

(xiii) provide for the detention of goods, plant, machinery or material, for the purpose of exacting the duty, the procedure in connection with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed, and the disposal of goods so detained or confiscated;

(xiv) authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods;

(xv) authorise and regulate the composition of offences against, or liabilities incurred under, this Act or the rules made thereunder;

(xvi) provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India:

Provided that rules made under this clause shall provide that when steel ingots on which the duty of excise imposed by this Act has been paid, or articles of iron or steel manufactured in British India from such ingots, are exported out of India, there shall be payable to the exporter of such ingots or articles, subject to such conditions as may be prescribed, a refund at the following rates, namely:—
on ingots, blooms and billets—

a refund at the rate of four rupees per ton,

on other manufactures of iron or steel—

(a) not fabricated—a refund at the rate of five and one-third rupees per ton;

(b) fabricated—a refund at the rate of six rupees per ton;

(xvii) exempt any goods from the whole or any part of the duty imposed by this Act;

(xviii) define an area no point in which shall be more than one hundred yards from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area;

(xix) define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area;

(xx) authorise the Central Board of Revenue or Collectors of Central Excise appointed for the purposes of this Act to provide, by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section.

(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding two thousand rupees and that any article in respect of which any such breach is committed shall be confiscated.

38. All rules made and notifications issued under this Act shall be made and issued by publication in the official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act:

Provided that every such rule shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.

39. The enactments specified in the Second Schedule are hereby repealed to the extent mentioned in the fourth column thereof. But all rules made, notifications published, licences, passes or permits granted, powers conferred and other things done under any such enactment and now in force shall, so far as they are not inconsistent with this Act, be deemed to have been respectively made, published, granted, conferred or done under this Act.

40. (1) No suit shall lie against the Central Government or against any officer of the Crown in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

THE FIRST SCHEDULE.

(See section 3.)

Item No.	Description of goods.	Rate of duty.
1	KEROSENE— "Kerosene" means any inflammable hydro-carbon (including any mixture of hydro-carbons or any liquid containing hydro-carbons but excluding motor-spirit) which— (i) is made from petroleum as defined in section 2 of the Indian Petroleum Act, 1899 (VIII of 1899), and (ii) is intended to be or is ordinarily used in liquid form for purposes of illumination.	The rate at which Customs duty is for the time being leviable under the Indian Tariff Act, 1934 (XXXII of 1934), read with any other enactment for the time being in force.
2	MATCHES— "Match" includes a firework in the form of a match; and, where a match-stick has more heads than one capable of being ignited by striking, each such head shall be deemed to be a match. (1) Matches, manufactured in a factory whose daily output exceeds one hundred gross of boxes, in boxes or booklets containing on an average— (i) not more than forty matches (ii) more than forty, but not more than fifty matches. (iii) more than fifty, but not more than sixty matches. (iv) more than sixty, but not more than eighty matches. (2) Matches, manufactured in a factory whose daily output does not exceed one hundred gross of boxes, in boxes or booklets containing on an average— (i) not more than forty matches (ii) more than forty, but not more than fifty matches. (iii) more than fifty, but not more than sixty matches. (iv) more than sixty, but not more than eighty matches. (3) Matches in boxes containing on an average not more than twelve matches of the type known as "Bengal Lights". (4) All other matches	Two rupees Two rupees and eight annas. Three rupees Four rupees One rupee, fifteen annas and two pies. Two rupees and seven annas. Two rupees, fourteen annas and nine pies. Three rupees, fourteen annas and four pies. Ten annas per gross of boxes. Eight annas for every 1,440 matches or fraction thereof.
3	MECHANICAL LIGHTERS— "Mechanical Lighter" means any mechanical or chemical contrivance for causing ignition which is portable and, which operates by producing a spark or flame whether by itself or when brought into contact with gas, and includes a mechanical lighter issued from a factory in an incomplete state or requiring for its completion the addition of a flint.	Three rupees per lighter.

Item No.	Description of goods.	Rate of duty.
4	MOTOR SPIRIT— “Motor spirit” means— (a) any inflammable hydro-carbon (including any mixture of hydro-carbons or any liquid containing hydro-carbons) which is capable of being used for providing reasonably efficient motive power for any form of motor vehicle; and (b) power alcohol, that is, ethyl alcohol of any grade (including such alcohol when denatured or otherwise treated), which either by itself or in admixture with any such hydro-carbon, is capable of being used as aforesaid	Fifteen annas per imperial gallon. For the year ending the 31st day of March, 1944, the rate fixed by section 2 of the Indian Finance Act 1943 (VIII of 1943), read with section 5 of the Indian Finance (Supplementary and Extending) Act, 1931, and thereafter the rate fixed annually by Act of the Central Legislature.
5	SALT— “Salt” includes swamp salt, spontaneous salt, and salt or saline solutions made or produced from any saline substance or from salt earth.	Three annas and seven and one-fifth pies per ounce Troy. Four rupees per ton.
6	SILVER	
7	STEEL INGOTS	
8	SUGAR PRODUCED IN A FACTORY ORDINARILY USING POWER IN THE COURSE OF PRODUCTION OF SUGAR— “Sugar” means any form of sugar containing more than ninety per cent. of sucrose:— (1) Sugar other than Khandsari or Palmyra (2) Khandsari sugar— that is to say, sugar in the manufacture of which neither a vacuum pan nor a vacuum evaporator is employed. (3) Palmyra sugar— that is to say, sugar manufactured from jaggery obtained by boiling the juice of the palmyra palm.	Three rupees per cwt. Eight annas per cwt. Nil.
9	TOBACCO, CURED— “Tobacco” means any form of tobacco, whether cured or uncured, and whether manufactured or not, and includes the leaf, stalks and stem of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth; I.—Virginia Tobacco— A.—Flue cured— (1) if intended for manufacture into— (a) cigarettes— (i) containing more than 20 per cent. weight of imported tobacco. (ii) containing 20 per cent. or less than 20 per cent. weight of imported tobacco. (iii) containing no imported tobacco (b) biris (c) cheroots (2) If intended for any other purpose B.—Air-cured	One rupee and twelve annas. One rupee and four annas. Eight annas. Six annas. Two annas. One rupee and twelve annas. Six annas. per lb.

Item No.	Description of goods.	Rate of duty.
II.—Country Tobacco—		
(1) if intended for manufacture into—		
(a) Cigarettes	Six annas	} Per lb.
(b) biris	Six annas	
(c) cigars or cheroots	Two annas	
(d) hookah tobacco	One anna	
(e) snuff	Six annas	
(2) if intended for sale as chewing tobacco, whether manufactured or merely cured.	One anna	
(3) if intended for any other purpose	Six annas	
III.—Stalks, stems and other refuse of tobacco—		
(1) if intended for use in the preparation of any form of manufactured tobacco.	One anna	
(2) if intended to be used for agricultural purposes.	Nil	
IV.—Tobacco manufactured into cigars and cheroots of which the value—		
(i) exceeds Rs. 30 a hundred	Six rupees	} Per hundred.
(ii) exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred.	Five rupees	
(iii) exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred.	Four rupees	
(iv) exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred.	Three rupees	
(v) exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred.	Two rupees	
(vi) exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred.	One rupee	
(vii) exceeds Rs. 2-8-0 a hundred but does not exceed Rs. 5 a hundred.	Eight annas	
(viii) exceeds Rs. 1-4-0 a hundred but does not exceed Rs. 2-8-0 a hundred.	Four annas	
(ix) exceeds Rs. 1-4-0 a hundred but does not exceed Rs. 1-4-0 a hundred.	Two annas	
10 TYRES—		
"Tyre" means a pneumatic tyre in the manufacture of which rubber is used and includes the inner tube and the outer cover of such a tyre.	Ten per cent. <i>ad valorem</i> .	
11 VEGETABLE PRODUCT—		
"Vegetable product" means any vegetable oil or fat which, whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption.	Five rupees per cwt.	

THE SECOND SCHEDULE.

(See sections 6 and 8).

PART A.

Excisable goods specified for the purposes of section 6—

1. Tobacco.

PART B.

Excisable goods specified for the purposes of section 8—

1. Tobacco.

THIRD SCHEDULE.

(See section 39.)

Year.	No.	Short title.	Extent of repeal..
1879	XVI	The Transport of salt Act, 1879	The whole.
1882	XII	The Indian Salt Act, 1882	The whole.
1889	IV	The Madras Salt Act, 1889	The whole.
		(Madras)	

Year.	No.	Short title.	Extent of
1890	II (Bombay)	The Bombay Salt Act, 1890	The whole.
1908	X	The Indian Salt-duties Act, 1908	The whole.
1917	II	The Motor Spirit (Duties) Act, 1917	The whole.
1922	XII	The Indian Finance Act, 1922	The whole.
1930	XVIII	The Silver (Exercise Duty) Act, 1930	The whole.
1931	..	The Indian Finance (Supplementary and Extend- ing) Act, 1931.	The whole.
1934	XIV	The Sugar (Excise Duty) Act, 1934	The whole.
1934	XVI	The Matches (Excise Duty) Act, 1934	The whole.
1934	XXIII	The Mechanical Lighters (Excise Duty) Act, 1934	The whole.
1934	XXXI	The Iron and Steel Duties Act, 1934	The whole.
1938	XIII	The Sind Salt Law Amendment Act, 1938	The whole.
1941	X	The Tyres (Excise Duty) Act, 1941	The whole.
1943	X	The Tobacco (Excise Duty) Act, 1943	The whole.
1943	XI	The Vegetable Product (Excise Duty) Act, 1943	The whole.

THE COFFEE MARKET EXPANSION (AMENDMENT) ACT, 1944.

Act No. II of 1944.

[27th February, 1944.]

An Act further to amend the Coffee Market Expansion Act, 1942.

WHEREAS it is expedient further to amend the Coffee Market Expansion Act, 1942 (VII of 1942), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE COFFEE MARKET EXPANSION (AMENDMENT) ACT, 1944.

Amendment of section 3,
Act VII of 1942.

2. In section 3 of the Coffee Market Expansion Act, 1942 (VII of 1942) (hereinafter referred to as the said Act), after clause (e) the following clause shall be inserted, namely:—

“(ee) “dealer” means a person carrying on the business of selling coffee, whether wholesale or by retail;”

Amendment of section 36,
Act VII of 1942.

3. In sub-section (1) of section 36 of the said Act, after the words “any licensed curer” the words “or dealer” shall be inserted.

Amendment of section
40, Act VII of 1942.

4. In sub-section (2) of section 40 of the said Act, after the words “Provincial Government” the following shall be inserted, namely:—

“or of the offence specified in sub-section (2) of section 16 except on complaint made by an officer authorised in this behalf either by the Provincial Government or by the Board”.

THE COAL MINES SAFETY (STOWING) AMENDMENT ACT, 1944.

Act No. III of 1944.

[7th March, 1944.]

An Act further to amend the Coal Mines Safety (Stowing) Act, 1939.

WHEREAS it is expedient further to amend the Coal Mines Safety (Stowing) Act, 1939 (XIX of 1939), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE COAL MINES SAFETY (STOWING) AMENDMENT ACT, 1944.

2. In sub-section (1) of section 8 of the Coal Mines Safety (Stowing) Act, 1939 (XIX of 1939) (hereinafter referred to as the said Act), in clause (iii), for the words “operations other than stowing” the words “stowing and other operations” shall be substituted.

Amendment of section 8,
Act XIX of 1939.

Amendment of section 10, Act XIX of 1939. 3. To section 10 of the said Act the following proviso shall be added, namely:—

"Provided that the power conferred by the proviso to sub-section (6) of the said section 10 to suspend the operation of a requisition under sub-section (1) of that section shall include a power similarly to suspend the operation of an order made under sub-section (3) of section 9 of this Act."

Insertion of new section 10-A in Act XIX of 1939. 4. After section 10 of the said Act the following section shall be inserted, namely:—

"10-A. *Powers of Board in executing operations.*—(1) If in the opinion of the Board it is necessary or desirable that any protective measures, including stowing, required in furtherance of the object of this Act, should be undertaken directly by the Board, the Board may execute or cause to be executed such measures under its own supervision.

(2) For the purposes of this section the Board shall have the right for itself and all persons employed in the execution of any work undertaken under this section to enter upon any property in which the work is to be done and to do therein all things necessary for the execution of the work.

(3) No person shall obstruct or interfere with the execution of any work undertaken under this section, and no person shall remove or tamper with any plant or machinery or any stowing or other material used in the execution of such work.

(4) Whoever contravenes the provisions of sub-section (3) shall be punishable with imprisonment for a term which may extend to six months or with fine or with both."

THE INDIAN COMPANIES (AMENDMENT) ACT, 1944.

Act No. IV of 1944.

[7th March, 1944.]

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913 (VII of 1913), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement. 1. (1) This Act may be called THE INDIAN COMPANIES (AMENDMENT) ACT, 1944.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Insertion of new section 277-I. 2. After section 277-H of the Indian Companies Act, 1913 (VII of 1913), (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

"277-IH.—*Prohibition of employment of managing agents and restrictions on certain forms of employment.*—No banking company, whether incorporated in or outside British India, which carries on business in British India, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, employ or be managed by a managing agent, or any person whose remuneration or part of whose remuneration takes the form of commission or a share in the profits of the company, or any person having a contract with the company for its management for a period exceeding five years at any one time:

Provided that the period of five years shall, for the purposes of this section, be computed from the date on which this section comes into force:

Provided further that any such contract may be renewed or extended for a further period not exceeding five years at a time if and so often as the directors think fit."

Substitution of new section 277-I. 3. For section 277-I of the said Act the following section shall be substituted, namely:—

"277-I. *Restrictions on commencement of business and conditions for carrying on business by banking company.*—(1) Notwithstanding anything contained in section 103, no banking company incorporated under this Act on or after the 15th day of January, 1937, shall commence business unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital, and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.

(2) No banking company, whether incorporated in or outside British India, if incorporated on or after the 15th day of January, 1937, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, carry on business in British India unless it satisfies the following conditions, namely:—

(a) that the subscribed capital of the company is not less than half the authorised capital, and the paid up capital is not less than half the subscribed capital, and

(b) that the capital of the company consists of ordinary shares only, or ordinary shares and such preference shares as may have been issued before the commencement of the Indian Companies (Amendment) Act, 1944, only, and

(c) that the voting rights of all shareholders are strictly proportionate to the contribution made by the shareholder, whether a preference shareholder or an ordinary shareholder, to the paid up capital of the company."

Amendment of section 277-L, Act VII of 1913. In sub-section (4) of section 277-L of the said Act, after the word, figures and letter "section 277-H" the words figures and letters "section 277-HH, section 277-I" shall be inserted.

THE INDIAN AIRCRAFT (AMENDMENT) ACT, 1944.

ACT No. V OF 1944.

[7th March, 1944.]

An Act further to amend the Indian Aircraft Act, 1934.

WHEREAS it is expedient further to amend the Indian Aircraft Act, 1934 (XXII of 1934), for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN AIRCRAFT (AMENDMENT) ACT, 1944.

Amendment of section 5, Act XXII of 1934.

2. In sub-section (2) of section 5 of the Indian Aircraft Act, 1934 (XXII of 1934), after clause (a) the following clauses shall be inserted, namely:—

"(aa) the regulation of air transport services, and the prohibition of the use of aircraft in such services except under the authority of and in accordance with a licence authorising the establishment of the service;

"(ab) the information to be furnished by an applicant for, or the holder of, a licence authorising the establishment of an air transport service to such authorities as may be specified in the rules;"

Further amendment of section 5, Act XXII of 1934.

3. After sub-section (2) of section 5 of the Indian Aircraft Act, 1934 (XXII of 1934), the following sub-section shall be added, namely:—

"(3) Rules to be laid before both Chambers.—Every rule made under this section shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for a total period of one month which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid, before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be."

THE TRANSFER OF PROPERTY (AMENDMENT) ACT, 1944.

ACT No. VI OF 1944.

[7th March, 1944.]

WHEREAS it is expedient further to amend the Transfer of Property Act, 1882 (IV of 1882), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE TRANSFER OF PROPERTY (AMENDMENT) ACT, 1944.

Insertion of new section 130-A in Act IV of 1882.

2. After section 130 of the Transfer of Property Act, 1882 (IV of 1882) (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

"130-A. *Transfer of policy of marine insurance.*—(1) A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

(2) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

(3) Where the insured person has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this sub-section affects the assignment of a policy after loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section."

Substitution of new section for section 135, Act IV of 1882.

3. For section 135 of the said Act the following section shall be substituted, namely:—

"Assignment of rights under policy of insurance against fire.—Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself."

Insertion of new section 135-A in Act IV of 1882.

4. After section 135 of the said Act, as substituted by this Act, the following section shall be inserted, namely:—

"135-A. Assignment of rights under policy of marine insurance.—(1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured persons as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section."

THE INSURANCE (AMENDMENT) ACT, 1944.

Act No. VII of 1944.

[7th March, 1944.]

An Act further to amend the Insurance Act, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938 (IV of 1938), for the purposes hereinafter appearing:

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INSURANCE (AMENDMENT) ACT, 1944.

Amendment of section 46, Act IV of 1938.

2. To section 46 of the Insurance Act, 1938 (IV of 1938) (hereinafter referred to as the said Act), the following proviso shall be added, namely:—

"Provided that nothing in this section shall apply to a policy of marine insurance."

Amendment of section 48, Act IV of 1938.

3. In section 48 of the said Act,—

(a) in sub-section (2) before the words "be eligible for election as directors" the following shall be inserted, namely:—

"unless disqualified under sub-section (2-A)";

(b) after sub-section (2) the following sub-section shall be inserted, namely:—

"(2-A) A person shall be ineligible for election as a director under sub-section (1) of any company if he is a director, officer, employee, or legal or technical adviser of that company, or of any other insurer, or is an insurance agent of employer of insurance agents, and shall cease to be a director under sub-section (1) if after election he acquires any disqualification specified in this sub-section or no longer holds the qualifications required by sub-section (2):

Provided that nothing in this sub-section shall disqualify a person who is an elected director under sub-section (1) and is not otherwise disqualified under this sub-section, from being re-elected:

Provided further that any director holding office at the commencement of the Insurance (Amendment) Act, 1944, shall not become ineligible to remain a director by virtue of this sub-section until the expiry of six months from the commencement of that Act."

Amendment of Third Schedule, Act IV of 1938.

4. In the Third Schedule to the said Act,—

(a) in Part I, in Regulation 2, after the words "appropriate for fire insurance" the words "and for marine insurance" shall be inserted, and the sentence "Form E is, as set out in Part II of this Schedule, appropriate for marine insurance business" shall be omitted;

(b) in Part II, Form E shall be omitted, and in Form F, for the words "and to" in the heading the words "Marine Insurance Business and" shall be substituted, and for the entry "United Kingdom, Foreign and Dominion Taxes" in the first column the entry "United Kingdom, British India, Dominion and Foreign Taxes" shall be substituted.

5. An insurer preparing in compliance with section 11 or section 16 of the Insurance Act, 1938 (IV of 1938), a revenue account in respect of marine insurance with reference to any year ending on any date before the 1st day of January, 1945, may prepare it in accordance with the Third Schedule to that Act either as it stood before or as it stands after its amendment by this Act.

Transitory provision.

THE CANTONMENTS (AMENDMENT) ACT, 1944.

ACT No. VIII OF 1944.

[17th March, 1944.]

An Act further to amend the Cantonments Act, 1924.

WHEREAS it is expedient further to amend the Cantonments Act, 1924 (II of 1924), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CANTONMENTS (AMENDMENT) ACT, 1944.

Amendment of section 3, Act II of 1924.

2. To section 3 of the Cantonments Act, 1924 (II of 1924) (hereinafter referred to as the said Act), the following sub-section shall be added, namely:—

"(4) The Central Government may, by notification in the official Gazette, direct that in any place declared a cantonment under sub-section (1) the provisions of any enactment relating to local self-government other than this Act shall have effect only to such extent or subject to such modifications, or that any authority constituted under any such enactment shall exercise authority only to such extent, as may be specified in the notification."

Amendment of section 15, Act II of 1924.

3. To sub-section (1) of section 15 of the said Act, after the first proviso, the following proviso shall be added, namely:—

"Provided further that until the termination of the hostilities in being at the commencement of the Cantonments (Amendment) Act, 1944, the foregoing proviso shall have effect as if the word 'elected' and the words 'not exceeding one year' were omitted."

Amendment of section 28, Act II of 1924.

4. In sub-section (1) of section 28 of the said Act, after the words "not being a person" the words "in receipt of pay" shall be inserted.

Amendment of section 31, Act II of 1924.

5. In clause (f) of section 31 of the said Act, after the words "the authority" the brackets and words, "(which may be an officer of the Provincial Government)" shall be inserted.

Amendment of section 126, Act II of 1924.

6. In section 126 of the said Act, for the words "may, by notice in writing" the words "by notice in writing may" shall be substituted and for the words "either to remove the same or to repair" the words "to remove the same, or may require him to repair" shall be substituted.

Amendment of section 215, Act II of 1924.

7. To sub-section (3) of section 215 of the said Act the following words shall be added, namely:—
"who shall give orders as to its disposal".

Amendment of section 216, Act II of 1924.

8. In sub-section (2) of section 216 of the said Act, for the word "Board", where it occurs for the second time, the words "President of the Board" shall be substituted.

THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1944.

ACT No. IX OF 1944.

[27th March, 1944.]

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923 (XXI of 1923), for a certain purpose;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1944.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. In sub-section (1) of section 209-A of the Indian Merchant Shipping Act, 1923 (XXI of 1923), after the words "together with a sum of one rupee for each day" the words "in respect of a deck pilgrim and a sum of three rupees for each day in respect of a cabin class pilgrim" shall be inserted.

THE INDIAN FINANCE ACT, 1944.

[31st March, 1944.]

An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April, 1944.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942), and to increase certain of those duties, to alter the duty of excise on tobacco and to impose duties of excise on betel-nuts, coffee and tea, to fix rates of income-tax and super-tax, and to continue the charge and levy of excess profits tax and make certain additional provisions relating thereto; It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN FINANCE ACT, 1944.

(2) It extends to the whole of British India.

Fixation of salt duty. 2. The duty on salt manufactured in, or imported by land into, British India shall, for the year beginning on the 1st day of April, 1944, be at the rate of one rupee and nine annas per standard maund.

3. For the year beginning on the 1st day of April, 1944, the Schedule contained in Schedule I to the Indian Finance Act, 1943 (VIII of 1943), shall again be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

4. (1) The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), or under the said Schedule read with any notification of the Central Government for the time being in force, imposed up to the 31st day of March, 1943, by section 6 of the Indian Finance Act, 1942 (XII of 1942), and continued up to the 31st day of March, 1944, by section 4 of the Indian Finance Act, 1943 (VIII of 1943), shall continue to be levied and collected as provided in section 6 of the Indian Finance Act, 1942 (XII of 1942), up to the 31st day of March, 1945, subject to the modification contained in sub-section (2).

(2) The additional duty to be levied and collected under the foregoing sub-section shall be one-half instead of one-fifth of the amount of the duty of customs specified in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in the case of the following goods, namely:—

(a) spirits, comprised in Item No. 22 (4) and in Item No. 22 (5) of the said Schedule;

(b) tobacco, comprised in Item No. 24 and in Item No. 24 (3) of the said Schedule;

(c) cigars, comprised in Item No. 24 (1), of the said Schedule;

(d) cigarettes, comprised in Item No. 24 (2) of the said Schedule.

Alteration of excise duties on tobacco and imposition of excise duties on betel-nuts, coffee and tea. 5. The amendments set out in Part I and Part II of the First Schedule shall be made respectively in the First and Second Schedules to the Central Excises and Salt Act, 1944 (I of 1944).

Income-tax and super-tax. 6. (1) Subject to the provisions of sub-sections (2), (3) and (5),—

(a) income-tax for the year beginning on the 1st day of April, 1944, shall be charged at the rates specified in Part I of the Second Schedule increased in each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1944, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) In making any assessment for the year ending on the 31st day of March, 1945,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922 (XI of 1922), to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943), on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922 (XI of 1922), the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943), on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In making any assessment for the year ending on the 31st day of March, 1944, or the year ending on the 31st day of March, 1945,—

(a) where the total income of a company includes any profits and gains from life insurance business the super-tax payable by the company on that part of its total income which consists of such inclusion shall be in the case of an assessment for the first mentioned year at the rate of one anna and one pie in the rupee and in the case of an assessment for the second mentioned year at the rate of nine pies in the rupee;

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusion bears to his total income, so, however, that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act, 1942 (XII of 1942), the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act.

(4) Where any assessment for the year ending on the 31st day of March, 1944, to which clause (a) or (b) of sub-section (3) is applicable has been completed at the rates of tax in operation under the Indian Finance Act, 1943 (VIII of 1943), it shall be revised by the Income-tax Officer in accordance with the provisions of clause (a) or (b), as the case may be, of sub-section (3) and the excess tax paid, if any, shall be refunded.

(5) In cases to which section 17 of the Indian Income-tax Act, 1922 (XI of 1922), applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-sections (2) and (3) of this section where applicable.

(6) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922 (XI of 1922).

(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1923), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date, not more than twelve months after the termination of the present hostilities, as the Central Government may fix.

Explanation.—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

(8) The provisions of section 23-A of the Indian Income-tax Act, 1922 (XI of 1922), shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1945.

Continuance of and rate of excess profits tax. 7. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures "31st day of March, 1944," the words and figures "31st day of March, 1945," shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940), shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1944, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

Further provisions respecting excess profits tax. 8. (1) In sub-rule (1) of rule 2 of the Second Schedule to the Excess Profits Tax Act, 1940 (XV of 1940),—

(a) for the words "and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted" the following shall be substituted, namely:—

"and in particular there shall be deducted any debts incurred in respect of the business for income-tax or super-tax or excess profits tax, or for advance payments due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or for any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943).";

(b) after clause (b) of the proviso the following clauses shall be inserted, namely:—

"(c) in the case of any advance payment due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), on the date on which, under the provisions of that section, the payment first became due;

(d) in the case of any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943), on the date on which, under the provisions of that section, the further sum became payable."

(2) To sub-section (1) of section 10 of the Indian Finance Act, 1942 (XII of 1942), the following proviso shall be added, namely:—

"Provided further that in respect of chargeable accounting periods ending after the 31st day of December, 1943, the amount repayable under this sub-section shall, subject to the provisions of the first of the foregoing provisos, be calculated by reference to the amount of the excess profits tax paid, and not by reference to the further amount deposited under this section."

(3) In section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943),—

(a) to sub-section (1) the following provisos shall be added, namely:—

"Provided that, in respect of any chargeable accounting period ending after the 31st day of December, 1943, the provisions of this sub-section shall have effect as if, in relation to any person who is a company, for the words 'one-fifth' the words 'nineteen-sixtyfourths' were substituted and as if, in relation to any other person, for the words 'one-fifth' the words 'seventeen-sixtyfourths' were substituted:

Provided further that if, in respect of any chargeable accounting period ending after the 31st day of December, 1943, a person who has deposited a further sum equal to seventeen-sixtyfourths of the excess profits tax payable shows that the amount of the income-tax and super-tax payable in respect of the excess profits arising in such period exceeds fifteen-sixtyfourths of the amount of the excess profits tax payable, so much of the deposit shall be refunded as will secure that the total of the deposit made and the income-tax and super-tax payable in respect of the excess profits arising in such period does not exceed one-half of the excess profits tax payable."

(b) after sub-section (1) the following sub-section shall be inserted, namely:—

"(1-A) In respect of any chargeable accounting period ending after the 31st day of December, 1943, in respect of which a provisional assessment of excess profits tax is made under section 14-A of the Excess Profits Tax Act, 1940 (XV of 1940), the person liable to pay such excess profits tax shall deposit in the manner laid down in sub-section (1) a further sum equal to nineteen-sixtyfourths of the amount of the said excess profits tax if such person is a company and seventeen-sixtyfourths of the said amount if such person is not a company; and the provisions of sub-sections (6) and (7) of the said section 14-A shall apply to any payment made under this sub-section as they apply to a payment of excess profits tax."

(c) in sub-section (4) for the words, brackets and figure "sub-section (1) of this section", where they occur for the first time, the words, brackets, figures and letter "sub-section (1) or (1-A) of this section" shall be substituted.

THE FIRST SCHEDULE.

(See Section 5.)

Amendments to be made in the Central Excises and Salt Act, 1944 (I of 1944).

PART I.

Amendments of First Schedule.

1. For Item No. 9, the following item shall be substituted, namely:—

9. Tobacco—

"Tobacco" means any form of tobacco whether cured or uncured, and whether manufactured or not, and includes the leaf, stalk and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth.

I. Unmanufactured tobacco—

- (1) if fluecured and intended for—

- (a) manufacture into cigarettes containing—

(i) more than 20 per cent weight of imported tobacco.	Per lb. Three rupees and eight annas.
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(ii) 20 per cent or less than 20 per cent weight of imported tobacco.	Two rupees and eight annas.
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(iii) no imported tobacco	One rupee.
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(b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b).	Three rupees and eight annas.
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- (2) if other than flue-cured and intended for—

(a) manufacture into cigarettes	Nine annas.
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(b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b).	Nine annas.
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- (3) whether flue-cured or not, if intended for—

- (a) manufacture into—

(i) biris	Nine annas.
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(ii) snuff	Nine annas.
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(iii) cigars and cheroots	Three annas.
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(iv) hookah tobacco	Three annas.
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(b) sale as chewing tobacco, whether manufactured or merely cured.	Three annas.
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(c) agricultural purposes	Nil.
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|--|-----------|
| (4) Stalks, stems and other refuse of tobacco intended for use in the preparation of any form of manufactured tobacco. | One anna. |
|--|-----------|

II. Manufactured tobacco—

Cigars and cheroots of which the value—

(i) exceeds Rs. 30 a hundred	Per hundred Twelve rupees.
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(ii) exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred.	Ten rupees.
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(iii) exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred.	Eight rupees.
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(iv) exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred.	Six rupees.
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(v) exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred.	Four rupees.
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(vi) exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred.	Two rupees.
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(vii) exceeds Rs. 2-8 a hundred but does not exceed Rs. 5 a hundred.	One rupee.
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(viii) exceeds Rs. 1-4 a hundred but does not exceed Rs. 2-8 a hundred.	Eight annas.
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(ix) exceeds Annas 12 a hundred but does not exceed Rs. 1-4 a hundred.	Four annas.
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2. After item No. 11, the following items shall be added, namely:—

"12. *Betel-nuts*, cured—

"Betel-nut" means the fruit of the areca-palm (*areca catechu*), whether with or without husk, whether cured or uncured, but does not include the fruit while still attached to the tree. Two annas per lb.

13. *Coffee*, cured—

"Coffee" means the seed of the coffee tree (*coffea*), whether with or without husk, whether cured or uncured, but does not include the seed while still attached to the tree. Two annas per lb.

14. *Tea*—

"Tea" means the commodity known as tea made from the leaves of the plant *Camellia Thea* (Linn.) and includes green tea. Two annas per lb.

PART II.

Amendment of Second Schedule.

In Part A after Item No. 1 (Tobacco) the following shall be added, namely:—

"2. Betel-nuts } When supplied by a curer to a wholesale dealer, whether directly or
3. Coffee. } through a broker or commission agent."

THE SECOND SCHEDULE.

(See Section 6.)

PART I.

Rates of Income-tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies:—

	Rate.	Surcharge.
1. On the first Rs. 1,500 of total income.	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 3,500 of total income.	Nine pies in the rupee.	Six pies in the rupee.
3. On the next Rs. 5,000 of total income.	One anna and three pies in the rupee.	Ten pies in the rupee.
4. On the next Rs. 5,000 of total income.	Two annas in the rupee.	One anna and six pies in the rupee.
5. On the balance of total income.	Two annas and six pies in the rupee.	Two annas in the rupee.

Provided that—

- (i) no income-tax shall be payable on a total income which does not exceed Rs. 2,000;
- (ii) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs. 2,000.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.	Surcharge.
On the whole of total income	Two annas and six pies in the rupee.	Two annas in the rupee.

PART II.

Rates of Super-tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate. Nil.	Surcharge. Nil.
1. On the first Rs. 25,000 of total income.	One anna in the rupee.	One anna in the rupee.
2. On the next Rs. 10,000 of total income.	Two annas in the rupee.	Two annas in the rupee.
3. On the next Rs. 20,000 of total income.	Three annas in the rupee.	Two annas and six pies in the rupee.
4. On the next Rs. 70,000 of total income.	Four annas in the rupee.	Three annas in the rupee.
5. On the next Rs. 75,000 of total income.	Five annas in the rupee.	Three annas in the rupee.
6. On the next Rs. 1,50,000 of total income.	Six annas in the rupee.	Three annas in the rupee.
7. On the next Rs. 1,50,000 of total income.	Seven annas in the rupee.	Three annas and six pies in the rupee.
8. On the balance of total income		

B.—In the case of every local authority—

On the whole of total income	One anna in the rupee.	One anna in the rupee.
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C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate. Nil.	Surcharge. Nil.
1. On the first Rs. 25,000 of total income.	One anna in the rupee.	One anna in the rupee.
2. On the balance of total income		

D.—In the case of every company—

On the whole of total income	Three annas in the rupee:
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Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of the profits of the previous year for the assessment for the year ending on the 31st day of March, 1945, not being a dividend payable at a fixed rate or a dividend declared on or before the 29th day of February, 1944, by a company to which but for sub-section (8) of section 6 of this Act, section 23-A of the Indian Income-tax Act, 1922 (XI of 1922), would be applicable.

THE INDIAN COCOANUT COMMITTEE ACT, 1944.

Act No. X of 1944.

[31st March, 1944.]

An Act to provide for the creation of a fund for the improvement and development of the cultivation, marketing and utilization of coconuts in India.

WHEREAS it is expedient to provide for the creation of a fund to be expended by a Committee specially constituted in this behalf for the improvement and development of the cultivation, marketing and utilization of coconuts in India; It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN COCOANUT COMMITTEE ACT, 1944.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Collector" means, in reference to copra consumed in a mill in British India, the Collector of the district in which the mill is situated or any other officer appointed by the Central Government to perform the duties of a Collector under this Act;

(b) "the Committee" means the Indian Coconut Committee constituted under this Act;

(c) "mill" means any place in which copra is crushed for the extraction of oil, which is a factory as defined in section 2 of the Indian Factories Act, 1934 (XXV of 1934);

(d) "prescribed" means prescribed by rules made under this Act.

3. There shall be levied and collected, as a cess for the purposes of this Act, on all copra consumed in any mill in British India, whether produced in or imported from outside British India, a duty of excise, at such rate, not exceeding four annas per cwt., as the Central Government may, after consulting the Committee by notification in the official Gazette, fix in this behalf.

4. As soon as may be after the commencement of this Act, the Central Government shall cause to be constituted a Committee consisting of the following members, to receive and expend the proceeds of the duty collected under this Act, namely:—

Constitution of Indian
Cocoanut Committee:

- (a) the Vice-Chairman, Imperial Council of Agricultural Research;
- (b) nine persons representing the growers of cocoanut in India, of whom two shall be nominated by the Government of Madras, two by the Government of the State of Travancore, and one each by the Government of Bombay, the Government of Bengal, the Government of Orissa, the Government of the State of Mysore, and the Government of the State of Cochin;
- (c) five persons representing the cocoanut oil industry, nominated respectively, by the Government of Madras, the Government of the State of Travancore, the Government of the State of Cochin, the Indian Merchants Association, Bombay, and the Bombay Chamber of commerce, Bombay;
- (d) three persons representing, respectively, the Provincial Government of Madras, the Government of the State of Mysore and the Government of the State of Travancore, appointed in each case by the Government concerned.
- (e) one person nominated by the Travancore Chamber of Commerce;
- (f) one person appointed by the Central Government;
- (g) six other persons, of whom two shall be persons elected from among themselves by the elected members of the Legislative Assembly of the Central Legislature, one shall be a person elected from among themselves by the elected members of the Council of State, and three shall be persons nominated respectively by the Governments of the States of Travancore, Mysore and Cochin.

5. The Committee shall be a body corporate by the name of the Indian Central Cocoanut Committee, having perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and to contract, and shall by the said name sue and be sued.

Incorporation of the Com-
mittee.

6. (1) If within the period prescribed in this behalf, or within such further period as the Central Government may allow, any authority or body fails to make any nomination, election or appointment which it is entitled to make under section 4, the Central Government may itself appoint a member to fill the vacancy in the Committee.

(2) Where a member of the Committee dies, resigns or is removed, or ceases to reside in India, or becomes incapable of acting, the Central Government may, on the recommendation of the authority or body which was entitled to make the first nomination, election or appointment under section 4, or where such recommendation is not made within a reasonable time, then on its own initiative, appoint a person to fill the vacancy.

(3) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Committee.

President of Committee,
Secretary, sub-committees
and staff.

7. (1) The Vice-Chairman, Imperial Council of Agricultural Research, shall be the President of the Committee.

(2) The Central Government shall appoint a person to be the Secretary of the Committee and such person shall be paid by the Committee such salary and such allowances as may be fixed by the Central Government.

(3) The Committee may appoint such sub-committees and staff as may be necessary for the efficient performance of its functions under this Act.

8. The Central Government may, on the recommendation of the Committee, appoint an officer or officers to discharge under the direction of the Committee such duties as may be prescribed, and such officer or officers shall be paid by the Committee such salary and allowances as may be fixed by the Central Government.

Appointment of officers.

9. It shall be the duty of the Committee to promote the improvement and development of the cultivation and marketing of cocoanuts and their utilization for the production of copra, coconut oil and coconut poonac and for such other purposes as the Committee may think fit—

(a) by undertaking, assisting or encouraging agricultural, industrial, technological and economic research;

(b) by the supply of technical advice to growers;

(c) by encouraging the adoption of improved methods of cultivation;

(d) by carrying on such propaganda in the interests of the coconut industry as may be necessary;

(e) by collecting statistics from growers, dealers, millers and other sources on all relevant matters bearing on the industry;

(f) by fixing grade standards of copra and its products;

(g) by recommending the maximum and minimum prices to be fixed for copra;

(h) by advising on all matters which require attention for the development of the industry;

(i) by improving the marketing of cocoanuts in India and abroad and suggesting suitable measures to prevent unfair competition; and

(j) by adopting any other measures or performing any other duties which it may be required by the Central Government to adopt or perform or which it may itself think necessary or advisable in order to carry out the purposes of this Act.

10. (1) The owner of every mill shall furnish to the Collector on or before the 7th day of each month, a return stating the total amount of copra consumed in the mill during the preceding month, together with such further information in regard thereto as may be prescribed:

Delivery of monthly returns.

Provided that no return shall be required in regard to copra consumed before the commencement of this Act.

(2) Every such return shall be made in such form and shall be verified in such manner as may be prescribed.

11. (1) On receiving any return made under section 10, the Collector shall assess the amount of the duty payable under section 3 in respect of the period to which the return relates, and if the amount has not already been paid shall cause a notice to be served upon the owner of the mill requiring him to make payment of the amount assessed within thirty days of the service of the notice.

(2) If the owner of any mill fails to furnish in due time the return referred to in sub-section (1) of section 10 or furnishes a return which the Collector has reason to believe is incorrect or defective, the Collector shall assess the amount, if any, payable by him in such manner, as may be prescribed, and the provisions of sub-section (1) shall thereupon apply as if such assessment had been made on the basis of a return furnished by the owner;

Provided that, in the case of a return which he has reason to believe is incorrect or defective, the Collector shall not assess the duty at an amount higher than that at which it is assessable on the basis of the return without giving to the owner a reasonable opportunity of proving the correctness and completeness of the return.

(3) A notice under sub-section (1) may be served on the owner of a mill either by post or by delivering it or tendering it to the owner or his agent at the mill.

Finality of assessment and recovery of unpaid duty. 12. (1) An assessment made in accordance with the provisions of section 11 shall not be questioned in any Court.

(2) Any owner of a mill who is aggrieved by an assessment made under section 11 may, within three months of service of the notice referred to in sub-section (1) of that section, apply to the Central Government for the cancellation or modification of the assessment and, on such application, the Central Government may cancel or modify the assessment and order the refund to such owner of the whole or part, as the case may be, of any amount paid thereunder.

(3) Any sum recoverable under section 11 may be recovered as an arrear of land-revenue.

Power to inspect mills and take copies of records and accounts.

13. (1) The Collector or any officer empowered by general or special order of the Central Government in this behalf shall have free access at all reasonable times during working hours to any mill or to any part of any mill.

(2) The Collector or any such officer may at any time, with or without notice to the owner, examine the working records, sale records and accounts of any mill and take copies of or extracts from all or any of the said records or accounts for the purpose of testing the accuracy of any return or of informing himself as to the particulars regarding which information is required for the purposes of this Act or any rules made thereunder.

(3) Where any officer other than the Collector proposes to examine under sub-section (2) any record or account containing the description or formulae of any trade process, the owner of the mill may give to the said officer, for transmission to the Collector, a written notice of objection and the officer shall thereupon seal up the record or account pending the orders of the Collector.

Information acquired to be confidential.

14. (1) All such copies and extracts and all information acquired by a Collector or any other officer from an inspection of any mill or warehouse or from any return submitted under this Act shall be treated as confidential.

(2) If the Collector or any such officer discloses to any person other than a superior officer any such information as aforesaid without the previous sanction of the Central Government, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine.

Provided that nothing in this section shall apply to the disclosure of any such information for the purposes of a prosecution in respect of the making of a false return under this Act.

Application of proceeds of duty.

15. (1) On the last day of each month, or as soon thereafter as may be convenient, the proceeds of the duty recovered during that month shall, after deduction of the expenses, if any, of collection and recovery, be paid to the Committee.

(2) Subject to such conditions as may be prescribed, the said proceeds and any other monies received by the Committee shall be applied to meeting the expenses of the Committee and the cost of such measures as it may subject to the control of the Central Government decide to undertake in the exercise of the functions specified in section 9.

Keeping and auditing of accounts.

16. (1) The Committee shall publish an annual report and shall keep accounts of all duty received by it under this Act and of the manner in which it is expended and shall also publish a summary of the accounts along with the annual report.

(2) Such accounts shall be examined and audited annually in the prescribed manner, and the auditors shall have power to disallow any item which has been, in their opinion, expended otherwise than in pursuance of the purposes of this Act.

(3) If any item is disallowed, an appeal shall lie to the Central Government whose decision shall be final.

17. The Central Government may, by notification in the official Gazette, declare that, with effect from such date as may be specified in the notification, the Committee shall be dissolved, and on the making of such declaration all funds and other property vested in the Committee shall vest in His Majesty for the purposes of the Central Government and this Act shall be deemed to have been repealed.

Power of the Central Government to make rules.

18. (1) The Central Government may make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) for prescribing the time within which nominations or elections shall be made under section 4 whether in the first instance or on the occurrence of vacancies;

(b) for prescribing the term of office of the members of the Committee;

(c) for prescribing the circumstances in which and the authority by which any member may be removed;

(d) for prescribing the quorum of the Committee;

(e) for the holding of a minimum number of meetings of the Committee during any year;

(f) for the maintenance by the Committee of a record of all business transacted and the submission of copies of such records to the Central Government;

(g) for the definition of the powers of the Committee to enter into contracts which shall be binding on the Committee, and the manner in which such contracts shall be executed;

(h) for the regulation of the travelling allowances of members of the Committee and of their remuneration, if any;

(i) for the definition of the powers of the Committee, in respect of the appointment, promotion and dismissal of officers and servants of the Committee, and in respect of the creation and abolition of appointments of such officers or servants;

(j) for the regulation of the grant of pay and leave to officers and servants of the Committee, and the payment of leave allowances to such officers and servants, and the remuneration to be paid to any person appointed to act for any officer or servant to whom leave is granted;

(k) for the regulation of the payment of pensions, gratuities, compassionate allowances and travelling allowances to officers and servants of the Committee;

(l) for prescribing the establishment and maintenance of a provident fund for the officers and servants of the Committee, and for the deduction of subscriptions to such provident fund from the pay and allowances of such officers and servants, other than Government servants whose services have been lent or transferred to the Committee;

(m) for prescribing the preparation of budget estimates of the annual receipts and expenditure of the Committee and of supplementary estimates of expenditure not included in the budget estimates, and the manner in which such estimates shall be sanctioned and published;

(n) for defining the powers of the Committee, the Standing Finance Sub-Committee, if any, and the President, respectively, in regard to the expenditure of the funds of the Committee, whether provision has or has not been made in the budget estimates or by re-appropriation for such expenditure, and in regard to the re-appropriation of estimated savings in the budget estimates of expenditure;

(o) for prescribing the maintenance of accounts of the receipts and expenditure of the Committee and providing for the audit of such accounts;

(p) for prescribing the manner in which payments are to be made by or on behalf of the Committee, and the officers by whom orders for making deposits or investments or for withdrawals or disposal of the funds of the Committee shall be signed;

(q) for determining the custody in which the current account of the Committee shall be kept, and the bank or banks at which surplus monies at the credit of the Committee may be deposited at interest, and the conditions on which such monies may be otherwise invested;

(r) for prescribing the preparation of a statement showing the sums allotted to Departments of Agriculture or institutions not under the direct control of the Committee for expenditure on research, the actual expenditure incurred, the outstanding liabilities, if any, and the disposal of unexpended balances at the end of the year;

(s) for prescribing the duties of the officers appointed under section 8, and the powers and duties of the Secretary of the Committee;

(t) any other matter which is to be or may be prescribed.

19. The Committee may, with the previous sanction of the Central Government, make regulations consistent with this Act and with any rules made under section 18 to provide for all or any of the following matters, namely:—

(a) the appointment of a Standing Finance Sub-Committee or other Sub-Committee and the delegation thereto of any powers exercisable under this Act by the Committee;

(b) the method of appointment, removal and replacement and the term of office of members of the Sub-Committees, and for the filling of vacancies therein;

(c) the dates, times and places for meetings of the Committee and the Sub-Committees and the procedure to be observed at such meetings;

(d) the circumstances in which security may be demanded from officers and servants of the Committee, and the amount and nature of such security in each case;

(e) the times at which, and the circumstances in which, payments may be made out of the provident fund and the conditions on which such payments shall relieve the fund from further liability;

(f) the contribution, if any, payable from the funds of the Committee to the provident fund;

(g) generally all matters incidental to the provident fund and the investment thereof.

Publication of rules and regulations.

20. All rules made under section 18 and all regulations made under section 19 shall be published in the *Gazette of India*.

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1944.

ACT No. XI OF 1944.

[12th April, 1944.]

An Act further to amend the Indian Income-tax Act, 1922.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922 (XI of 1922), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1944.

2. In sub-section (1) of section 7 of the Indian Income-tax Act, 1922 (XI of 1922),
Amendment of section 7,
Act XI of 1922.

(hereinafter referred to as the said Act), in *Explanation 2*, the words "at or in connection with the termination of his employment, whether or not the employment is then terminated, or to be terminated," shall be omitted.

Amendment of section
14, Act XI of 1922.

3. In sub-section (1) of section 14 of the said Act, after the words "Hindu undivided family" the following words shall be added, namely:—

"where such sum has been paid out of the income of the family".

Amendment of section
15, Act XI of 1922.

4. After sub-section (2) of section 15 of the said Act, the following sub-section shall be inserted, namely:—

"(2-A) Nothing in sub-section (1) or sub-section (2) shall apply to so much of any premium or other payment made on a policy other than a contract for a deferred annuity as is in excess of ten per cent. of the actual capital sum assured; and in calculating any such capital sum no account shall be taken of the value of any premiums agreed to be returned or of any benefit by way of bonus or otherwise which is to be or may be received either before or after death either by the person paying the premium or by any other person and which is not the sum actually assured."

Insertion of new section
18-A in Act XI of 1922.

5. After section 18 of the said Act, the following section shall be inserted, namely:—

"18-A. (1) (a) In the case of income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment, the Income-tax Officer may, on or after the 1st day of April, in any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December and 15th day of March in that year, respectively, an amount equal to one-quarter of the income-tax and super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed, if that total income exceeded six thousand rupees. Such income-tax and super-tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount of income-tax and super-tax so calculated on the said total income the same proportion as the amount of such inclusions bears to his total income or, in cases where under the provisions of sub-section (1) of section 17 both income-tax and super-tax or super-tax are chargeable with reference to the total world income, shall bear to the total amount of income-tax and super-tax which would have been payable on his total world income of the said previous year had it been his total income the same proportion as the amount of such inclusions bears to his total world income.

Provided that, where the previous year of the assessee in respect of any source of income ends after the 31st day of December and before the 30th day of April, the order in writing issued by the Income-tax Officer requiring the payment of income-tax and super-tax on that source of income shall substitute for the four quarterly payments hereinbefore specified, three payments of equal amount to be made on the 15th day of September, the 15th day of December and the 15th day of March, respectively:

Provided further that, if the assessee is a partner of a registered firm and an assessment of the firm has been completed for a previous year later than that for which the assessee's last assessment has been completed, his share in the profits of the firm shall, for the purposes of this sub-section, be included in his total income on the basis of the latest assessment of the firm:

Provided further that, if after the making of an order by the Income-tax Officer and before the 15th day of February of the financial year an assessment of the assessee or of the registered firm of which he is a partner is completed in respect of a previous year later than that referred to in the order of the Income-tax Officer, the Income-tax Officer may make an amended order requiring the assessee to pay in one instalment on the specified date, or in equal instalments on the specified dates if more than one, falling after the date of the amended order, the tax computed on the revised basis as reduced by the amount, if any, paid in accordance with the original order; but if the amount already paid exceeds the tax determined on the revised basis, the excess shall be refunded.

(b) If the notice of demand issued under section 29 in pursuance of the order under clause (a) of this sub-section is served after any of the dates on which the instalments specified therein are payable, the tax shall be payable in equal instalments on each of such of those dates as fall after the date of the service of the notice of demand, or in one sum on the 15th day of March if the notice is served after the 15th day of December.

(2) If any assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that the part of his income to which that sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub-section (1) on that part of his income for such period, and, shall pay such amount as accords with his estimate in equal instalments on such of the dates specified in sub-section (1) (a) as have not expired or in one sum if only the last of such dates has not expired:

Provided that the assessee may send a revised estimate of the tax payable by him before any one of the dates specified in sub-section (1) (a) and adjust any excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments.

(3) Any person who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed six thousand rupees, send to the Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub-section (1), and shall pay the amount, on such of the dates specified in that sub-section as have not expired, by instalments which may be revised according to the proviso to sub-section (2).

(4) Where part of the income to which sub-section (1), (2) or (3) applies consists of any income of the nature of commission which is receivable periodically and is not received or adjusted by the payer in the assessee's account before any of the quarterly instalments of tax become due, he may defer payment of tax on that part of his income to the date on which such income would be normally received or adjusted and if he does so he shall communicate to the Income-tax Officer the date to which such payment is deferred:

Provided that, if the tax of which the payment is deferred is not paid within fifteen days of the date on which such income or part thereof is received or adjusted by the payer in the assessee's account, the tax shall be payable with six per cent. simple interest per annum from the date of such receipt or adjustment to the date of payment of the tax.

(5) The Central Government shall pay on any amount paid under this section simple interest at two per cent. per annum from the date of payment to the date of the assessment (hereinafter called the 'regular assessment') made under section 23 of the income, profits and gains of the previous year for an assessment for the year next following the year in which the amount was payable:

Provided that on any portion of such amount which is refunded under the foregoing provisions of this section interest shall be payable only up to the date on which the refund was made.

(6) Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent. of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of section 18 do not apply and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent. per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent.:

Provided that, where, as a result of an appeal under section 31 or section 33 or of a revision under section 33-A or of a reference to the High Court under section 66, the amount on which interest was payable under this sub-section has been reduced the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded together with the amount of income-tax that is refundable:

Provided further that, where a business, profession or vocation is newly set up and is assessable on the income, profits and gains of its first previous year in the financial year following that in which it is set up, the interest payable shall be computed from the 1st day of April of the said financial year..

(7) Where, on making the regular assessment, the Income-tax Officer finds that any assessee has—

(a) under sub-section (2) or sub-section (3) underestimated the tax payable by him and thereby reduced the amount payable in any of the first three instalments, or,

(b) under sub-section (4) wrongly deferred the payment of tax on a part of his income,

he may direct that the assessee shall pay simple interest at six per cent. per annum, in the case referred to in clause (a) for the period during which the payment was deficient on the difference between the amount paid in each such instalment and the amount which should have been paid having regard to the aggregate tax actually paid under this section during the year, and in the case referred to in clause (b) for the period during which the payment of tax was wrongly deferred on the amount of which the payment was so deferred:

Provided that for the purposes of this sub-section any instalment due before the expiry of six months from the commencement of the previous year in respect of which it is to be paid shall be deemed to have become due fifteen days after the expiry of the said six months.

(8) Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment.

(9) If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment, is satisfied that any assessee—

(a) has furnished under sub-section (2) or sub-section (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue, or

(b) has without reasonable cause failed to comply with the provisions of sub-section (3),

the assessee shall be deemed, in the case referred to in clause (a), to have deliberately furnished inaccurate particulars of his income, and in the case referred to in clause (b), to have failed to furnish the return of his total income; and the provisions of section 28, so far as may be, shall apply accordingly:

Provided that the amount of penalty leviable shall, in the case referred to in clause (d), be a sum not exceeding one-and-a-half times the amount by which the tax actually paid during the year under the provisions of this section falls short of the tax that should have been paid by the assessee under sub-section (1) or eighty per cent. of the tax determined on the basis of the regular assessment as modified in the manner provided in sub-section (6), whichever is the less, and, in the case referred to in clause (b), one-and-a-half times the said eighty per cent.

(10) (a) If any assessee does not pay on the specified dates any instalment of tax that he is required to pay under sub-section (1) and does not, before the date on which any such instalment as is not paid becomes due, send under sub-section (2) an estimate or a revised estimate of the tax payable by him, he shall be deemed to be an assessee in default in respect of such instalment or instalments..

(b) If any assessee has sent under sub-section (2) or sub-section (3) an estimate or a revised estimate of the tax payable by him, but does not pay any instalment in accordance therewith on the date or dates specified in sub-section (1), he shall be deemed to be an assessee in default in respect of such instalment or instalments:

Provided that the assessee shall not, under clause (a) or (b), be deemed to be in default in respect of any amount of which the payment is deferred under sub-section (4) until after the date communicated by him to the Income-tax Officer under that sub-section.

(11) Any sum other than a penalty or interest paid by or recovered from an assessee in pursuance of the provisions of this section shall be treated as a payment of tax in respect of the income of the period which would be the previous year for an assessment for the financial year next following the year in which it was payable, and credit therefor shall be given to the assessee in the regular assessment."

(a) in sub-section (1), in the existing proviso, after the word "Provided" the word "further" shall be inserted, and before that proviso the following proviso shall be inserted, namely:—

"Provided that, where the loss sustained is a loss of profits or gains which would but for the loss have accrued or arisen within an Indian State and would, under the provisions of clause (c) of sub-section (2) of section 14, have been exempt from tax, such loss shall not be set off except against profits or gains accruing or arising within an Indian State and exempt from tax under the said provisions;"

(b) in sub-section (2), in the proviso, clauses (a), (b), (c) and (d) shall be re-lettered as clauses (b), (c), (d) and (e), respectively, and the following shall be inserted as clause (a), namely:—

"(a) where the loss sustained is a loss of profits and gains of a business, profession or vocation to which the first proviso to sub-section (1) is applicable, and the profits and gains of that business, profession or vocation are, under the provisions of clause (c) of sub-section (2) of section 14, exempt from tax, such loss shall not be set off except against profits and gains accruing or arising in an Indian State from the same business, profession or vocation and exempt from tax under the said provisions;"

7. In sub-section (1) of section 25 of the said Act, for the words and figures "on which income-tax was not at any time charged under the provisions of the Indian Income-tax Act, 1918," the words, brackets and figure "to which sub-section (3) is not applicable" shall be substituted.

Amendment of section 29, Act XI of 1922. 8. In section 29 of the said Act, for the words "tax or penalty", in both places where they occur, the words "tax, penalty or interest" shall be substituted.

Amendment of section 30, Act XI of 1922. 9. In section 30 of the said Act,—

(a) in sub-section (1), for the words, figures and letter "or objecting to a refusal of an Income-tax Officer to register a firm under section 26-A" the following shall be substituted, namely:—

"or objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-section (4) of section 23 or to a refusal to register a firm under sub-section (4) of section 23 or section 26-A";

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1-A) Any person having in accordance with the provisions of sub-section (3-A), (3-B) or (3-C) of section 18, read with sub-section (6) of that section, deducted and paid tax in respect of any sum chargeable under this Act other than interest who denies his liability to make such deduction may appeal to the Appellate Assistant Commissioner to be declared not liable to make such deduction."

(c) In sub-section (2), after the words "thirty days" the following shall be inserted, namely:—

"of the payment of the tax deducted under sub-section (3-A), (3-B) or (3-C) of section 18 or".

Amendment of section 31, Act XI of 1922. 10. In sub-section (3) of section 31 of the said Act,—

(a) for the words, figures and letter "or, in the case of an order refusing to register a firm under section 26-A", occurring after clause (b), the following shall be substituted, namely:—

"or, in the case of an order cancelling the registration of a firm under sub-section (4) of section 23 or refusing to register a firm under sub-section (4) of section 23 or section 26-A";

(b) after clause (g) and before the first proviso, the following shall be inserted, namely:—

"or, in the case of an appeal under sub-section (1-A) of section 30,

(h) decide that the person is or is not liable to make the deduction and in the latter case direct the refund of the sum paid under sub-section (6) of section 18;"

Amendment of section 33, Act XI of 1922. 11. In section 33 of the said Act, sub-section (5) shall be renumbered as sub-section (6) and the following sub-section shall be inserted as sub-section (5), namely:—

"(5) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Tribunal may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association."

Amendment of section 47, Act XI of 1922. 12. In section 47 of the said Act, after the words, brackets and figures "or sub-section (1) of section 46" the following shall be inserted, namely:—

"and any interest payable under the provisions of sub-section (4), (6), (7) or (8) of section 18-A".

13. In section 56 of the said Act, before the words "Subject to the provisions of this Chapter" the words, brackets, letter and figures, "Except in cases to which by clause (a) of the proviso to sub-sections (3) and (4) of section 25 those sub-sections do not apply and" shall be inserted.

Amendment of the Schedule to Act XI of 1922.

14. In the Schedule to the said Act,—

(a) in the proviso to rule 2,—

(i) in clause (b), for the word "received", where it occurs for the second time, the word "payable" shall be substituted;

(ii) for clause (c) the following clauses shall be substituted, namely:—

"(c) 90 per cent. of the first year's premiums received during the preceding year in respect of all other life insurance policies, plus;

(d) 12 per cent. of all renewal premiums received during the preceding year."

(b) in rule 3 for clause (c) the following clause shall be substituted, namely:—

"(c) interest received in respect of any securities of the Central Government which have been issued or declared to be income-tax free shall not be excluded but the whole amount of such interest received during the inter-valuation period shall be exempt from income-tax under the second proviso to section 8 though not from super-tax";

(c) in rule 5,—

(i) in clause (ii), after the words "but excludes profits on the realization of securities" the words "or other assets" shall be added;

(ii) in clause (iii) after the words "and losses on the realization of, securities" the words "or other assets" shall be inserted.

THE DELHI MUSLIM WAKFS (AMENDMENT) ACT, 1944.

Act No. XII of 1944.

[26th April, 1944.

An Act to amend the Delhi Muslim Wakfs Act, 1943.

WHEREAS it is expedient to amend the Delhi Muslim Wakfs Act, 1943 (XIII of 1943), for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE DELHI MUSLIM WAKFS (AMENDMENT) ACT, 1944.

Amendment of section 25, Act XIII of 1943.

2. In sub-section (2) of section 25 of the Delhi Muslim Wakfs Act, 1943 (XIII of 1943)—

(1) after the word "Committee", where it occurs for the first time, the following shall be inserted, namely:—

"(being now a Society registered under Act XXI of 1860)".

(2) after the word "Committee", where it occurs for the second time, the following shall be inserted, namely:—

"(being now a Society registered as aforesaid)",

(3) for the words "in respect of the *māsid*s and *idgah*s under its supervision" the words "in respect of wakfs in the Province" shall be substituted.

THE PROTECTIVE DUTIES CONTINUATION ACT, 1944.

Act No. XIII of 1944.

[26th April, 1944.

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect.

WHEREAS it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), shall have effect; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PROTECTIVE DUTIES CONTINUATION ACT, 1944.

2. In the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in items Nos. 10 (1), 11 (1), 17, 43, 44, 44 (1), 46, 46 (1), 47, 47 (1), 47 (6), 48, 48 (1), 48 (3), 48 (4), 48 (5), 48 (7), 48 (9), 48 (10), 49 (5), 51 (2), 51 (3), 61 (5), 63 (2), 63 (3), 63 (6), 63 (9), 63 (10), 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25), 63 (27) and 74, for the entry or entries in the seventh column "March 31st, 1944" the entry or entries "March 31st, 1946" shall be substituted.
- Amendment of the First Schedule, Act XXXII of 1934.
2. In section 3 of the Sugar Industry (Protection) Act, 1932 (XIII of 1932), for the figures, "1944" the figures "1946" shall be substituted.
- Amendment of section 3, Act XIII of 1932.

THE FACTORIES (AMENDMENT) ACT, 1944.

ACT No. XIV of 1944.

[26th April, 1944.]

An Act further to amend the Factories Act, 1934.

WHEREAS it is expedient further to amend the Factories Act, 1934 (XXV of 1934), for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FACTORIES (AMENDMENT) ACT, 1944.

2. In section 9 of the Factories Act, 1934 (XXV of 1934) (hereinafter referred to as the said Act), in sub-section (1) the word "and" occurring at the end of clause (d) shall be omitted and after clause (e) the following word and clause shall be added, namely:—
- Amendment of section 9, Act XXV of 1934.

" ; and

(f) such other particulars as may be prescribed for the purposes of this Act."

3. In sub-section (3) of section 19 of the said Act, the words "in which any process involving contact by the workers with injurious or obnoxious substances is carried on" shall be omitted.
- Amendment of section 19, Act XXV of 1934.

4. In sub-section (1) of section 23 of the said Act, for the words "as can reasonably be required in the circumstances of each factory" the words "as may be prescribed" shall be substituted.
- Amendment of section 23, Act XXV of 1934.

5. Until the termination of the hostilities in being at the commencement of this Act the first proviso to sub-section (1) of section 45 and the proviso to sub-section (3) of section 54 of the said Act shall have effect as if for the figures and letters "7-30 P.M." the figures and letters "8-30 P.M." had been substituted.
- Temporary amendment of sections 45 and 54, Act XXV of 1934.

THE INDIAN PATENTS AND DESIGNS (TEMPORARY AMENDMENT) ACT, 1944.

ACT No. XV of 1944.

[22nd November, 1944.]

An Act temporarily to amend the Indian Patents and Designs Act, 1911.

WHEREAS it is expedient temporarily to amend the Indian Patents and Designs Act, 1911 (II of 1911), for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be THE INDIAN PATENTS AND DESIGNS (TEMPORARY AMENDMENT) ACT, 1944.

2. During the period beginning on the 3rd day of September, 1939, and ending on the expiry of six months after the cessation of the present hostilities, section 21 of the Indian Patents and Designs Act, 1911, shall have effect, and shall be deemed to have had effect throughout the said period, as if—
- Temporary amendment of section 21, Act II of 1911.

(a) after sub-section (3) the following sub-section had been inserted, namely:—

"(3-A) The powers of officers or authorities administering any department of the service of His Majesty under sub-section (2) or sub-section (3) to make, use or exercise an invention for the service of the Crown shall include the power to make, use, exercise or vend an invention upon such terms as are mentioned in sub-section (2) or sub-section (3), as the case may be, for any purpose which appears to any such officer or authority necessary or expedient for the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community; and the terms of any such agreement or licence as is mentioned in sub-section (2) shall be inoperative so far as concerns the making, use, exercise or vending of an invention under this sub-section as they are inoperative so far as concerns the making, use or exercise of an invention under sub-section (2).";

(b) in sub-section (4) for the words "or exercise" the words "exercise or vending" had been substituted;

(c) to sub-section (5) the following proviso had been added, namely:—

"Provided that nothing in this sub-section shall affect the right to vend an invention conferred by sub-section (3-A).";

(d) after sub-section (5) the following sub-section had been inserted, namely:—

"(5-A) The purchaser of any article sold in pursuance of sub-section (3-A) or sub-section (5) and any person claiming through him may deal with the article in like manner as if the patent for the invention were held on behalf of His Majesty."

THE COFFEE MARKET EXPANSION (SECOND AMENDMENT) ACT, 1944.

ACT No. XVI OF 1944.

[22nd November, 1944.

An Act further to amend the Coffee Market Expansion Act, 1942.

WHEREAS it is expedient further to amend the Coffee Market Expansion Act, 1942 (VII of 1942), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE COFFEE MARKET EXPANSION (SECOND AMENDMENT) ACT, 1944.

Amendment of section 31, Act VII of 1942.

2. To sub-section (1) of section 31 of the Coffee Market Expansion Act, 1942, the following shall be added, namely:—

"and any sums transferred to the general fund under the proviso to sub-section (2) of section 32."

Amendment of section 32, Act VII of 1942.

3. To sub-section (2) of section 32 of the Coffee Market Expansion Act, 1942, the following proviso shall be added, namely:—

"Provided that where, after the requirements of the clauses of this sub-section have been met, there remains any excess in the pool fund, the Board may, with the previous sanction of the Central Government, transfer the whole or any part of such excess to the credit of the general fund."

THE DELHI JOINT WATER AND SEWAGE BOARD (AMENDMENT) ACT, 1944.

ACT No. XVII OF 1944.

[22nd November, 1944.

An Act further to amend the Delhi Joint Water and Sewage Board Act, 1926.

WHEREAS it is expedient further to amend the Delhi Joint Water and Sewage Board Act, 1926 (XXIII of 1926), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE DELHI JOINT WATER AND SEWAGE BOARD (AMENDMENT) ACT, 1944.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Amendment of long title

2. In the long title and preamble of the Delhi Joint Water and Sewage Board Act, 1926 (hereinafter referred to as the said Act),—

(a) after the word "maintenance" wherever it occurs, the words "improvement and extension" shall be inserted;

(b) for the words "urban area of the city" the words "town and suburbs" shall be substituted.

Amendment of section 2, Act XXIII of 1926.

3. In clause (c) of section 2 of the said Act,—

(a) the word "and" at the end of sub-clause (iii) shall be omitted;

(b) after sub-clause (iv) the following sub-clause shall be inserted, namely:—

"(v) any such local authority as the Central Government may, by notification in the official Gazette, declare to be a constituent body."

Amendment of section 11, Act XXIII of 1926.

4. In the second proviso to section 11 of the said Act, the words "of the city" shall be omitted.

5. Sections 14-A, 14-B and 14-C of the said Act shall be re-numbered as sections 14-C, 14-D and 14-E respectively, and after section 14 of the said Act but before the heading "Disposal of sewage and payment therefor" the following sections shall be inserted, namely:—

Supply of water by agreement otherwise than writing of the Central Government, enter into an agreement with any person to supply water in bulk for consumption in an area outside the jurisdiction of any of the constituent bodies.

Provided that the Central Government shall not accord its sanction to any such agreement unless it is satisfied that full compliance therewith can be made without prejudice to the supplies of water required to be made under section 11:

Provided further that except in the case of a supply made for consumption in an area where the usual sources of water supply have been injuriously affected by the Board's measures for the disposal of sewage, the charges made for water supplied under any such agreement shall not be less than one and a half times the final issue rate payable for the same period of supply by the constituent bodies.

14-B. Any sums due under an agreement entered into under section 14-A may, on a certificate issued by the President of the Board to the effect that the sums are due and have remained unpaid for not less than three months, be recovered by the Collector of the Delhi District from the person with whom the agreement was made or from any other person who has benefited from the supply, as if they were arrears of land revenue.

6. In sub-section (1) and (2) of section 14-E of the said Act as renumbered by section 5 of this Act, for the figures and letter "14-B" the figures and letter "14-D" shall be substituted.

Amendment of section 14-E, Act XXIII of 1926.

THE PUBLIC DEBT (CENTRAL GOVERNMENT) ACT, 1944.

ACT No. XVIII OF 1944.

[22nd November, 1944.]

An Act to consolidate and amend the law relating to Government securities issued by the Central Government and to the management by the Reserve Bank of India of the public debt of the Central Government.

WHEREAS it is expedient to consolidate and amend the law relating to Government securities issued by the Central Government and to the management by the Reserve Bank of India of the public debt of the Central Government;

It is hereby enacted as follows:—

Short title, extent and commencement. 1. (1) This Act may be called THE PUBLIC DEBT (CENTRAL GOVERNMENT) ACT, 1944.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Bank" means the Reserve Bank of India;

(2) "Government security" means—

(a) a security, created and issued, whether before or after the commencement of this Act, by the Central Government for the purpose of raising a public loan, and having one of the following forms, namely:—

(i) stock transferable by registration in the books of the Bank; or

(ii) a promissory note payable to order; or

(iii) a bearer bond payable to bearer; or

(iv) a form prescribed in this behalf;

(b) any other security created and issued by the Central Government in such form and for such of the purposes of this Act as may be prescribed;

(3) "prescribed" means prescribed by rules made under this Act;

(4) "promissory note" includes a treasury bill.

3. (1) Subject to the provisions of section 5, a transfer of a Government security shall be made only in the manner prescribed for the making of transfers of securities of the class to which it belongs, and no transfer of a Government security made after the commencement of this Act shall be valid if—

(a) it does not purport to convey the full title to the security, or

(b) it is of such a nature as to affect the manner in which the security was expressed by the Central Government to be held.

Transfer of Government securities.

(2) Nothing in this section shall affect any order made by the Bank under this Act, or any order made by a Court upon the Bank.

4. Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (XXVI of 1881), a person shall not, by reason only of his having transferred a Government security, be liable to pay any money due either as principal or as interest thereunder.

5. (1) In the case of any public office to which the Central Government may, by notification in the official Gazette, declare this sub-section to apply, a Government security in the form of stock or of a promissory note may be held in the name of the office.

(2) When a Government security is so held, it shall be deemed to be transferred without any or further endorsement or transfer deed from each holder of the office to the succeeding holder of the office on and from the date on which the latter takes charge of the office.

(3) When the holder of the office transfers to a party not being his successor in office a Government security so held, the transfer shall be made by the signature of the holder of the office and the name of the office in the manner and subject to the conditions laid down in section 3.

(4) This section applies as well to an office of which there are two or more joint holders as to an office of which there is a single holder.

6. (1) No notice of any trust in respect of any Government security shall be receivable by the Central Government, nor shall the Central Government be bound by any such notice even though expressly given, nor shall the Central Government be regarded as a trustee in respect of any Government security.

(2) Without prejudice to the provisions of sub-section (1), the Bank may, as an act of grace and without any liability to the Bank or to the Central Government, record in its books such directions by the holder of stock for the payment of interest on, or of the maturity value of, or the transfer of, or such other matters relating to, the stock as the Bank thinks fit.

7. Subject to the provisions of section 9, the executors or administrators of a deceased sole holder of a Government security and the holder of a succession certificate issued under Part X of the Indian Succession Act, 1925 (XXXIX of 1925), shall be the only persons who may be recognised by the Bank as having any title to the Government security:

Persons whose title to a Government security of a deceased sole holder may be recognised by the Bank.

Provided that nothing in this section shall bar the recognition by the Bank of the manager or the sole surviving male member of a Hindu undivided family governed by the Mitakshara Law as having a title to a Government security, when the security appears to the Bank to stand in the name of a deceased member of the family and an application is made by such manager or sole surviving member for recognition of his title and is supported by a certificate signed by such authority and after such inquiry as may be prescribed to the effect that the deceased belonged to a Hindu undivided family governed by the Mitakshara Law, that the Government security formed part of the joint property of the family, and that the applicant is the managing or sole surviving male member of the family.

Explanation.—The expression "Hindu undivided family governed by the Mitakshara Law" shall, for the purposes of this section, be deemed to include a Malabar *tarwad*.

Right of survivors of joint holders or several payees.

8. Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872 (IX of 1872),—

(a) when a Government security is held by two or more persons jointly and either or any of them dies, the title to the security shall vest in the survivor or survivors of those persons, and

(b) when a Government security is payable to two or more persons severally and either or any of them dies, the security shall be payable to the survivor or survivors of those persons or to the representative of the deceased or to any of them:

Provided that nothing contained in this section shall affect any claim which any representative of a deceased person may have against the survivor or survivors under or in respect of any security to which this section applies.

Explanation.—For the purposes of this section a body incorporated under the Indian Companies Act, 1913 (VII of 1913), or the Co-operative Societies Act, 1912 (II of 1912), or any other enactment for the time being in force whether within or without British India, relating to the incorporation of associations of individuals, shall be deemed to be when it is dissolved.

9. Notwithstanding anything contained in section 7, if within six months of the death

Summary procedure on death of holder of Government securities not exceeding five thousand rupees face value.

of a person who was the holder of a Government security or securities the face value of which does not in the aggregate exceed five thousand rupees, probate of his will or letters of administration of his estate or a succession certificate issued under Part X of the Indian Succession Act, 1925 (XXXIX of 1925), is not produced to the Bank, or proof to the satisfaction of the Bank that proceedings have been instituted to obtain one of these is not furnished, the Bank may determine who is the person entitled to the security or securities, or to administer the estate of the deceased and may make an order vesting the security or securities in the person so determined.

10. When a Government security or securities belong to a minor or a person who is

Government securities not exceeding five thousand rupees face value belonging to minor or insane person.

insane and incapable of managing his affairs and the face value of the security or securities does not in the aggregate exceed five thousand rupees, the Bank may make such order as it thinks fit for the vesting of such security or securities in such person as it considers represents the minor or insane person.

11. (1) If the person entitled to a Government security applies to the Bank alleging

Issue of duplicate securities and of new securities on conversion, consolidation, sub-division or renewal.

that the security has been lost, stolen or destroyed, or has been defaced or mutilated, the Bank may, on proof to its satisfaction of the loss, theft, destruction, defacement or mutilation of the security, subject to such conditions and on payment of such fees as may be prescribed, order the issue of a duplicate security payable to the applicant.

(2) If the person entitled to a Government security applies to the Bank to have the security converted into a security of another form, or into a security issued in connection with another loan or to have it consolidated with other like securities, or to have it subdivided, or to have it renewed, the Bank may, subject to such conditions and on payment of such fees as may be prescribed, cancel the security and order the issue of a new security or securities.

(3) The person to whom a duplicate security or a new security is issued under this section shall be deemed for the purposes of section 19 to have been recognised by the Bank as the holder of the security; and a duplicate security or new security so issued to any person shall be deemed to constitute a new contract between the Central Government and such person and all persons deriving title thereafter through him.

Summary determination by the Bank of title to Government security in case of dispute.

12. (1) If the Bank is of opinion that a doubt exists as to the title to a Government security, it may proceed to determine the person who shall for the purposes of the Bank be deemed to be the person entitled thereto.

(2) The Bank shall give notice in writing to each claimant of whom it has knowledge, stating the names of all other claimants and the time when and the officer of the Bank by whom the determination of the Bank will be made.

(3) The Bank shall give notice in writing to each claimant of the result of the determination so made.

(4) On the expiry of six months from the issue of the notices referred to in subsection (3), the Bank may make an order vesting in the person, found by the Bank to be entitled to the security, the security and any unpaid interest thereon.

13. Notwithstanding that as a matter of convenience the Central Government may

Law applicable in regard to Government securities.

have arranged for payments on a Government security to be made elsewhere than in British India, the rights of all persons in relation to Government securities shall be determined in connection with all such questions as are dealt with by this Act by the law and in the Courts of British India.

14. (1) For the purpose of making any order which it is empowered to make under

Recording of evidence.

this Act, the Bank may request a District Magistrate or in an Indian State the Political Agent to record or to have recorded the whole or any part of such evidence as any person whose evidence the Bank requires may produce. A District Magistrate so requested may himself record, or may direct any Magistrate of the first class subordinate to him or any Magistrate of the second class subordinate to him and empowered in this behalf by general or special order of the Provincial Government to record the evidence, and shall forward a copy thereof to the Bank.

(2) For the purpose of making a vesting order under this Act the Bank may direct one of its officers to record the evidence of any person whose evidence the Bank requires or may receive evidence upon affidavit.

(3) A Magistrate or an officer of the Bank acting in pursuance of this section may administer an oath to any witness examined by him.

15. Where the Bank contemplates making an order under this Act to vest a Government security in any person, the Bank may suspend payment of interest on or the maturity value of the security or postpone the making of any order under section 11 or the registration of any transfer of the security until the vesting order has been made.

16. (1) Before making any order which it is empowered to make under this Act, the Bank may require the person in whose favour the order is to be made to execute a bond with one or more sureties in such form as may be prescribed or to furnish security not exceeding twice the value of the subject-matter of the order, to be held at the disposal of the Bank, to pay to the Bank or any person to whom the Bank may assign the bond or security in furtherance of sub-section (2) the amount thereof.

(2) A Court before which a claim in respect of the subject-matter of any such order is established may order the bond or security to be assigned to the successful claimant who shall thereupon be entitled to enforce the bond or realise the security to the extent of such claim.

17. Any notice required to be given by the Bank under this Act may be served by post, but every such notice shall also be published by the Bank in the official Gazette, and on such publication shall be deemed to have been delivered to all persons for whom it is intended.

18. An order made by the Bank under this Act may confer the full title to a Government security or may confer a title only to the accrued and accruing interest on the security, pending a further order vesting the full title.

19. No recognition by the Bank of a person as the holder of a Government security, and no order made by the Bank under this Act shall be called in question by any Court so far as such recognition or order affects the relations of the Central Government or the Bank with the person recognised by the Bank as the holder of a Government security or with any person claiming an interest in such security; and any such recognition by the Bank of any person or any order by the Bank vesting a Government security in any person shall operate to confer on that person a title to the security subject only to a personal liability to the rightful owner of the security for money had and received on his account.

20. Where the Bank contemplates making with reference to any Government security any order which it is empowered to make under this Act, and before the order is made the Bank receives from a Court in British India an order to stay the making of such order, the Bank shall either—

(a) hold the security together with any interest unpaid or accruing thereon until the further orders of the Court are received, or

(b) apply to the Court to have the security transferred to the Official Trustees appointed for the Province in which such Court is situated, pending the disposal of the proceedings before the Court.

21. Where the Bank contemplates making an order under this Act vesting a Government security in any person the Bank may, at any time before the order is made, cancel any proceedings already taken for that purpose and may, on such cancellation, proceed anew to the making of such order.

22. Save as otherwise expressly provided in the terms of a Government security, no person shall be entitled to claim interest on such security in respect of any period which has elapsed after the earliest date on which demand could have been made for the payment of the amount due on such security.

23. The Central Government shall be discharged from all liability on a bearer bond or on any interest coupon of such a bond on payment to the holder of such bond or coupon on presentation on or after the date when it becomes due of the amount expressed therein, unless before such payment an order of a Court in British India has been served on the Central Government restraining it from making payment.

24. Where no shorter period of limitation is fixed by any law for the time being in force, the liability of the Central Government in respect of any interest payment due on a Government security shall terminate on the expiry of six years from the date on which the amount due by way of interest became payable.

25. No person shall be entitled to inspect, or to receive information derived from any Government security in the possession or custody of the Central Government or from any book, register, or other document kept or maintained by or on behalf of the Central Government in relation to Government securities or any Government security, save in such circumstances and manner and subject to such conditions as may be prescribed.

26. For the purposes of section 124 of the Indian Evidence Act, 1872 (I of 1872); the provisions of Part IV of the Code of Civil Procedure, 1908 (V of 1908), relating to suits by or against public officers in their official capacity, and the provisions of rule 27 of Order V, and rule 52 of Order XXI of the said Code, the Bank and its officers to be deemed public officers. Bank and any officer of the Bank acting in his capacity as such shall be deemed to be a public officer.

27. (1) If any person, for the purpose of obtaining for himself or for any other person any title to a Government security, makes to any authority under this Act in any application made under this Act or in the course of any inquiry undertaken in pursuance of this Act any statement which is false and which he either knows to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to six months, or with fine or with both.

(2) No Court shall take cognisance of any offence under sub-section (1) except on the complaint of the Bank.

28. (1) The Central Government may, subject to the condition of previous publication, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(a) the forms in which Government securities may be issued;
(b) the form of the obligations referred to in clause (iv) of sub-clause (a) of clause (2) of section 2;
(c) the conditions subject to which Government securities may be issued to the rulers of Indian States;

(d) the manner in which different forms of Government securities may be transferred;
(e) the holding of Government securities in the form of stock by the holders of offices other than public offices and the manner in which and the conditions subject to which Government securities so held may be transferred;

(f) the manner in which payment of interest in respect of Government securities is to be made and acknowledged;

(g) the conditions governing the grant of duplicate, renewed, converted, consolidated and sub-divided Government securities;

(h) the fees to be paid in respect of the issue of duplicate Government securities and of the renewal, conversion, consolidation and sub-division of Government securities;

(i) the form in which receipt of a Government security delivered for discharge, renewal, conversion, consolidation or sub-division is to be acknowledged;

(j) the manner of attestation of documents relating to Government securities in the form of stock;

(k) the manner in which any document relating to a Government security or any endorsement on a promissory note issued by the Central Government may, on the demand of a person who from any cause is unable to write, be executed on his behalf;

(l) the form of the bonds referred to in sub-section (1) of section 16;

(m) the circumstance and the manner in which and the conditions subject to which inspection of Government securities, books, registers and other documents may be allowed or information therefrom may be given under section 25;

(n) the procedure to be followed in making vesting orders;

(o) the authority by whom the certificate referred to in the proviso to section 7 is to be granted and the manner of making the inquiry therein mentioned.

(3) A copy of all rules under this section shall be laid on the table of both the Chambers of the Indian Legislature as soon as may be after they are made.

29. The Indian Securities Act, 1920 (X of 1920), shall cease to apply to Government securities to which this Act applies, and to all matters for which provision is made by this Act.

Act X of 1920 not to apply to Government securities.

MADRAS ACTS. 1944.

THE MADRAS ESTATES LAND (TEMPORARY AMENDMENT) ACT, 1944.

ACT No. I of 1944.

[18th January, 1944.]

An Act temporarily to amend the Madras Estates Land Act, 1908, for certain purposes.

WHEREAS it is expedient temporarily to amend the Madras Estates Land Act, 1908, for the purpose of increasing the production of food in the present emergency in estates situated in the Province of Madras;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called *THE MADRAS ESTATES LAND (TEMPORARY AMENDMENT) ACT, 1944.*

2. Notwithstanding anything contained in the Madras Estates Land Act, 1908 (hereinafter referred to as the said Act), it shall be open to a

Right of landholder to admit person to temporary possession of ryoti land in certain cases.

following conditions and to Provincial Government:—

landholder as defined in that Act, at any time during the continuance of the present war or within a period of one year from the termination thereof, to admit any person to temporary possession of ryoti land situated in his estate and not already in the possession of a ryot or tenant, subject to the such further conditions, if any, as may be notified by the

(i) The person so admitted (who shall be deemed to be a ryot within the meaning of the said Act and is hereinafter referred to as such) shall be entitled to be in possession of the land only for such period, not being less than three nor more than five years, as may be agreed upon between him and the landholder.

(ii) Only food crops, that is to say, crops notified by the Provincial Government as food crops for this purpose, shall be raised on the land.

(iii) The whole of the land shall be brought under cultivation within a period of two years from the date on which the ryot is admitted to possession thereof.

(iv) (a) Except with the previous consent in writing of the landholder, the ryot shall not sell, mortgage, lease or otherwise transfer any interest in the land or any portion thereof.

(b) The ryot's interest in the land shall not be liable to attachment or sale in execution of a decree or order of a Court.

(v) The ryot shall pay rent at such rate, if any, as may be agreed upon between him and the landholder, provided that such rate shall not exceed—

(a) in the case of any land exceeding one hundred rupees per acre in value, or commanded by an irrigation project, or in the case of an irrigated land or land situated in the ayacut of an irrigation source, the lowest rate prevailing for similar lands with similar advantages in the neighbourhood, or in case such rate cannot be ascertained, the rate which the Collector may, on application, decide to be fair and equitable; and

(b) in the case of any other land, the lowest rate for dry lands prevailing in the village, or in case such rate cannot be ascertained, the rate which the Collector may, on application, decide to be fair and equitable;

Explanation I.—The provisions of the said Act shall apply to an application under sub-clause (a) or sub-clause (b) of this clause, as if such application were one made under the first paragraph of section 25 of the said Act.

Explanation II.—The rent payable under this clause shall be exclusive of any watercess leviable from the ryot under the Madras Irrigation Cess Act, 1865.

Explanation III.—The landholder shall not be entitled to receive from the ryot anything more than the rent payable under this clause in respect of his tenancy for the period agreed upon under clause (i); and in particular, the landholder shall have no right to receive any premium or consideration by way of premium in respect of such tenancy.

(vi) The ryot shall quit the land at the expiry of the period agreed upon under clause (i), unless the landholder authorizes him in writing to continue in possession thereof, in which case he shall be deemed to have been admitted by the landholder to possession of the land within the meaning of section 6 (1) of the said Act on the date of such expiry, and shall accordingly have a permanent right of occupancy therein with effect on and from such date.

When authorizing the ryot as aforesaid, the landholder may receive a premium from the ryot, but a ryot so authorized shall under no circumstances become liable to make any payment to the landholder after the date aforesaid by way of premium or other consideration for such authorization; nor shall the land be subjected to any charge in respect of any such premium or consideration or part thereof.

(vii) The provisions of section 151 of the said Act shall have effect as if for sub-section (1) thereof the following sub-sections were substituted, namely:—

“(1) The landholder may institute a suit before the Collector to eject the ryot from the land only on one or more of the following grounds, namely:—

(a) that the ryot has materially impaired the value of the land for agricultural purposes and rendered it substantially unfit for such purposes,

(b) that the period agreed upon under clause (i) of section 2 of the Madras Estates Land (Temporary Amendment) Act, 1944, has expired and the ryot has not been authorized to continue in possession of the land under clause (vi) of that section, and

(c) that the ryot has broken any of the conditions specified in, or notified under, section 2 of the Act aforesaid.”

(viii) If the ryot has made any improvements in respect of the land during the period agreed upon under clause (i), the following provisions shall apply:—

(a) The liability of the ryot to be ejected from the land in accordance with the provisions of the said Act, as modified by clause (vii), shall not in any way be affected, nor shall the ryot be entitled to claim any compensation in respect of the improvements.

(b) If however the ryot obtains a permanent right of occupancy in the land at the expiry of the period aforesaid, the rent payable by him shall be determined without taking the improvements into consideration; but the landholder shall have the right to pay compensation to the ryot for the improvements, in which case the rent shall be determined after taking the improvements into consideration.

Power to make rules. 3. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may adapt or modify the provisions of the said Act in their application to all or any cases governed by this Act; or declare any such provision to be inapplicable thereto.

(3) All rules made under this section shall be published in the *Fort St. George Gazette* and upon such publication shall have effect as if enacted in this Act.

Application of Madras Act I of 1908. 4. The provisions of the said Act shall apply to all cases governed by this Act, save as otherwise expressly provided herein or in rules made hereunder.

THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1944.

ACT No. II OF 1944.

[17th February, 1944.]

An Act further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1944.

Renumbering of section 18-A as section 18-B and insertion of new section 18-A in Madras Act V of 1920.

2. Section 18-A of the Madras District Municipalities Act, 1920, shall be renumbered as section 18-B and the following shall be inserted as section 18-A, namely:—

"18-A. If at any time it appears to the district collector that the chairman or the vice-chairman, as the case may be, is for any reason not likely to exercise or discharge all or any of the powers and duties conferred, imposed or devolving on or delegated to him by or under this Act, then, notwithstanding anything contained in this Act or in the rules or notifications thereunder, the district collector may, by order in writing, authorize any councillor other than the chairman or the vice-chairman, as the case may be, to exercise and discharge all the powers and duties of the chairman or the vice-chairman, as the case may be, for such period as may be specified in the order."

Insertion of new section 25-A in Madras Act XIV of 1920.

3. After section 25 of the Madras Local Boards Act, 1920, the following section shall be inserted, namely:—

"25-A. If at any time it appears to the district collector that the president or the vice-president, as the case may be, of a local board is for any reason not likely to exercise or discharge all or any of the powers and duties conferred, imposed or devolving on or delegated to him by or under this Act, then, notwithstanding anything contained in this Act or in the rules or notifications thereunder, the district collector may, by order in writing, authorize any member of the local board other than the president or the vice-president, as the case may be, to exercise and discharge all the powers and duties of the president or the vice-president, as the case may be, for such period as may be specified in the order."

THE MADRAS CITY MUNICIPAL AND DISTRICT MUNICIPALITIES (AMENDMENT) ACT, 1944.

ACT No. III OF 1944.

[28th February, 1944.]

An Act further to amend the Madras City Municipal Act, 1919, and the Madras District Municipalities Act, 1920.

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, and the Madras District Municipalities Act, 1920, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL AND DISTRICT MUNICIPALITIES (AMENDMENT) ACT, 1944.

Amendment of section 100, Madras Act IV of 1919.

2. (1) In sub-section (2) of section 100 of the Madras City Municipal Act, 1919, for the words "less a deduction in the case of buildings only of ten per centum of such annual rent", the following words shall be substituted, namely:—

"less a deduction, in the case of buildings, of ten per cent. of that portion of such annual rent which is attributable to the buildings alone, apart from their sites and the adjacent lands occupied as an appurtenance thereto;"

(2) The amendment made by sub-section (1) shall be deemed to have taken effect from the commencement of the Madras City Municipal (Amendment) Act, 1936.

3. (1) In sub-section (2) of section 82 of the Madras District Municipalities Act, 1920, for the words "less a deduction, in the case of buildings only, of ten per centum of such annual rent", the following words shall be substituted, namely:—

"less a deduction, in the case of buildings, of ten per cent. of that portion of such annual rent which is attributable to the buildings alone, apart from their sites and the adjacent lands occupied as an appurtenance thereto;"

(2) The amendment made by sub-section (1) shall be deemed to have taken effect from the commencement of the Madras District Municipalities (Amendment) Act, 1930.

4. Nothing contained in this Act shall be deemed to invalidate any decree or order passed by a Civil Court before the commencement of this Act, which has become final.

THE MADRAS PUBLIC HEALTH (AMENDMENT) ACT, 1944.

ACT No. IV of 1944.

[28th February, 1944.]

An Act further to amend the Madras Public Health Act, 1939.

WHEREAS it is expedient further to amend the Madras Public Health Act, 1939, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS PUBLIC HEALTH (AMENDMENT) ACT, 1944.

2. In clause (17) of section 3 of the Madras Public Health Act, 1939 (hereinafter referred to as the said Act), after the word and figures "section 62" the words, figures and letter "and leprosy as defined in section 80-A" shall be inserted.

Amendment of section 3, Madras Act III of 1939.

Amendment of section 52, Madras Act III of 1939.

3. In section 52 of the said Act, the entry "(h) leprosy" shall be omitted, and entries (i) to (q) shall be relettered as entries (h) to (p) respectively.

Amendment of section 62, Madras Act III of 1939.

4. In section 62 of the said Act, the entry "(e) leprosy" shall be omitted, and entries (f) to (l) shall be relettered as entries (e) to (k) respectively.

Insertion of new Part IV in Chapter VII of Madras Act III of 1939.

5. In Chapter VII of the said Act, Part IV shall be renumbered as Part V and the following shall be inserted as Part IV, namely:—

"PART IV.

LEPROSY.

Definitions.

Definitions.

80-A. In this Part—

(a) 'Leprosy' means open leprosy, that is to say, that form of the disease in which leprosy bacilli can be demonstrated from the mucous membrane of the patient's nose or from his skin, by any recognized standard method of examination approved by the Surgeon-General with the Government.

(b) 'Authorized practitioner' means a medical practitioner registered under the Madras Medical Registration Act, 1914, and authorized by the Government in this behalf.

General.

Provision for treatment of leprosy by local authorities.

80-B. A local authority may, and if so required by the Government shall, make such arrangements in its local area as may be directed by the Government for—

(a) the free diagnosis and treatment of persons suffering, or suspected to suffer, from leprosy, and

(b) the prevention of infection from leprosy.

Persons suffering from leprosy not to engage in certain occupations.

80-C. (1) No person who knows that he is suffering from leprosy shall, until he is certified by an authorized practitioner to be non-infectious and to have been so for a period of not less than three months, engage himself or accept any employment—

(i) as a cook, attendant, workman, salesman, server or carrier in any place where food is sold to members of the public or is prepared or stored for such sale,

(ii) as a dairy worker tending on, or milking cows whose milk is to be sold or distributed to members of the public, or as a seller or distributor of milk to members of the public,

(iii) as a driver or conductor of a public conveyance,

(iv) as a public servant, or

(v) in any other capacity which, in the opinion of the Health Officer, involves deleterious contact with other persons not suffering from leprosy.

(2) No person who knows that he is suffering from leprosy shall, until he is certified by an authorized practitioner to be non-infectious and to have been so for a period of not less than six months—

(a) attend any school, college, playground or other similar place, either as a teacher or as a member of the staff employed therein; or

(b) engage himself or accept any employment—

(i) as a doctor, nurse, midwife, ayah or orderly,

(ii) as a barber or hair-dresser,

(iii) as a tailor,

(iv) as a dhobi or launderer,

(v) as a house servant, personal attender or a peon, or

(vi) in any other capacity which, in the opinion of the Health Officer, involves deleterious contact with children.

(3) No one who has the care of any person whom he knows to be suffering from leprosy shall cause or permit such person to engage himself or accept any employment in any of the capacities referred to in sub-section (1), or to attend any place or engage himself or accept any employment in any of the capacities referred to in sub-section (2), until he is certified by an authorized practitioner as set forth in sub-section (1) or sub-section (2), as the case may be.

(4) No one shall engage or employ any person whom he knows to be suffering from leprosy in any of the capacities referred to in sub-sections (1) and (2), until he is certified by an authorized practitioner as set forth in sub-section (1) or sub-section (2) as the case may be.

Special areas.

Notification of special areas for leprosy.

80-D. The Government may, by notification, declare any area in the Province to be a "Special Area" for leprosy, and thereupon the provisions of sections 80-E and 80-F shall apply to such area.

80-E. (1) No person who knows that he is suffering from leprosy shall—

Persons suffering from leprosy not to use public conveyance.

(a) enter any public conveyance used for the conveyance of passengers at separate fares, or

(b) enter any other public conveyance, without previously intimating to the owner, driver or conductor thereof that he is suffering from leprosy.

(2) No person who has the care of a person whom he knows to be suffering from leprosy shall permit him to be carried—

(a) in any public conveyance used for the conveyance of passengers at separate fares, or

(b) in any other public conveyance, without previously intimating to the owner, driver or conductor thereof that he is suffering from leprosy.

(3) The owner, driver or conductor of a public conveyance used for the conveyance of passengers at separate fares shall not convey therein a person whom he knows to be suffering from leprosy at any time when a passenger not suffering from leprosy is being conveyed therein:

Provided that a person suffering from leprosy may be conveyed in the public conveyance aforesaid in such cases of emergency and subject to such restrictions and safeguards as may be notified by the Government.

(4) The owner or driver of any other public conveyance may refuse to convey therein any person suffering from leprosy until he has been paid a sum sufficient to cover any loss and expense which will be incurred by reason of the provisions of the next succeeding sub-section.

(5) The person in charge of a public conveyance in which a person whom he knows to be suffering from leprosy has been conveyed shall, as soon as practicable, give notice to the Health Officer of the local area in which the conveyance is usually kept and before permitting any other person to enter the conveyance, shall cause it to be disinfected.

(6) The local authority, when so requested by the person in charge of a public conveyance in which a person suffering from leprosy has been conveyed, shall provide for its disinfection.

Prohibition of persons suffering from leprosy from attending school, college or taking out books from public libraries.

80-F. (1) No person who knows that he is suffering from leprosy shall—

- (a) attend any school, college, playground or such other place, or
- (b) take any book or cause any book to be taken for his use or use any book taken, from any public or circulating library.
- (2) No person who has the care of a person whom he knows to be suffering from leprosy shall permit him to do any of the acts prohibited by sub-section (1).

Segregation.

80-G. The Government may, on the recommendation of the Director of Public Health, by notification declare any area in the Province to be a "Segregation area", if they are satisfied that in such area adequate segregation accommodation for persons suffering from leprosy has been provided by the local authority, or has been placed at its disposal and set apart by it for the purpose; and thereupon, the following provisions shall apply to such area:—

(i) The Health Officer may, by notice, require any person suffering from leprosy and residing within the segregation area to remove himself to such segregation accommodation as may be specified in the notice and remain there until such time as he is certified by an authorized practitioner to be no longer infectious.

(ii) The notice shall allow a reasonable period for compliance therewith.

(iii) If the person suffering from leprosy does not comply with the notice within the period allowed therein, the Health Officer may have him compulsorily removed to the segregation accommodation specified therein, using such force as may be reasonably necessary for the purpose.

(iv) The Health Officer may permit any person detained in the segregation accommodation to engage himself or accept employment in any of the capacities other than those specified in section 80-C, provided that it does not involve the performance of any act specifically prohibited by this Act.

(v) The notice referred to in clause (i) may be given to the person who has the care of a person suffering from leprosy, and thereupon it shall be the duty of the former to remove the person suffering from leprosy to the segregation accommodation specified in the notice.

(vi) If any person suffering from leprosy escapes from, or leaves the segregation accommodation provided for him, without the written permission of the Health Officer or any other officer authorized by him in this behalf, such person may be arrested without a warrant by any police officer or by anyone specially empowered by the Government and removed forthwith to such segregation accommodation.

(vii) The local authority shall arrange for the food, clothing and other necessities of every person suffering from leprosy who is detained in the segregation accommodation, but any such person shall be at liberty to make his own arrangements for his food, clothing or other necessities.

(viii) If any person is arrested under clause (vi) after having been arrested and dealt with under that clause on at least three previous occasions, he shall, if the Health Officer so directs in writing, be produced before a Presidency Magistrate or a Magistrate of the First Class who shall have power to order his detention in a leprosy annexe attached to a prison, until such time as he is certified by an authorized practitioner to be no longer infectious; and thereupon all the provisions of the law for the time being in force shall, so far as may be and with such modifications, if any, as may be prescribed, apply to such person, as if he had been sentenced to simple imprisonment for the period for which such detention was ordered.

If the Magistrate does not order such detention or if the order of detention passed by him is subsequently cancelled, whether by himself or by any other Presidency Magistrate or a Magistrate of the First Class, the person arrested or detained, as the case may be, shall forthwith be removed to the segregation accommodation aforesaid.

Revocation of certificates.

80-H. Where any authority prescribed in this behalf has reason to believe that a certificate such as is referred to in section 80-C or in clause (i) of section 80-G issued in respect of any person suffering from leprosy, has ceased to be correct by reason of his having subsequently become infectious, such authority may require such person to obtain a fresh certificate from any authorized practitioner of his choice, as to the character of his leprosy, that is to say, as to whether he is or is not infectious.

Unless a fresh certificate as aforesaid is obtained by the person suffering from leprosy within such period as may be prescribed and such certificate declares him to be non-infectious, the certificate previously issued shall, for the purposes of all the provisions contained in this part, be deemed to have been cancelled."

Amendment of section 81, Madras Act III of 1939. 6. In section 81 of the said Act, after the words "infectious disease", the words, figures and letter "including leprosy as defined in section 80-A" shall be inserted.

Amendment of Schedule I, Madras Act III of 1939. 7. In Schedule I to the said Act, after the entry relating to section 79 the following entries shall be inserted, namely:—

"80-C—

- (1) and (2) Person knowing that he is suffering from leprosy accepting employment in certain capacities, etc. Fifty rupees.
- (3) Causing or permitting person known to suffer from leprosy to accept employment in such capacities. Fifty rupees.
- (4) Engaging person known to suffer from leprosy in such capacities. Fifty rupees.

80-E—

- (1) Person knowing that he is suffering from leprosy using public conveyance. Fifty rupees.
- (2) Permitting person known to suffer from leprosy to use public conveyance. Fifty rupees.
- (3) Conveying person known to suffer from leprosy in public conveyance. Fifty rupees.
- (5) Failing to give notice that person known to suffer from leprosy was conveyed in public conveyance or to disinfect such conveyance. Fifty rupees.

80-F—

- (1) Person knowing that he is suffering from leprosy attending school or taking books from public library, etc. Fifty rupees.
- (2) Permitting person known to suffer from leprosy to attend school or take books from public library, etc. Fifty rupees."

Amendment of Schedule II, Madras Act III of 1939. 8. In Schedule II to the said Act, after the entry relating to section 77, the following entries shall be inserted, namely:—

"80-C—

- (1) and (2) Person knowing that he is suffering from leprosy accepting employment in certain capacities, etc. Ten rupees.
- (3) Causing or permitting person known to suffer from leprosy to accept employment in such capacities. Ten rupees.
- (4) Engaging person known to suffer from leprosy in such capacities. Ten rupees.

80-F—

- (1) Person knowing that he is suffering from leprosy attending school or taking books from public library, etc. Ten rupees.
- (2) Permitting person known to suffer from leprosy to attend school or take books from public library, etc. Ten rupees."

THE MADRAS HINDU RELIGIOUS ENDOWMENTS (AMENDMENT) ACT, 1944.

Act No. V of 1944.

[7th March, 1944.

An Act further to amend the Madras Hindu Religious Endowments Act, 1926.

WHEREAS it is expedient further to amend the Madras Hindu Religious Endowments Act, 1926, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS HINDU RELIGIOUS ENDOWMENTS (AMENDMENT) ACT, 1944.

Amendment of section 9, Madras Act II of 1927.

2. In section 9 of the Madras Hindu Religious Endowments Act, 1926 (hereinafter referred to as the said Act); clauses (2) and (4) shall be omitted.

Amendment of section 17, Madras Act II of 1927.

3. In section 17 of the said Act—

(i) in the opening paragraph, for the words "such control as may be prescribed" the words "any rules made under this Act" shall be substituted;

(ii) in clause (a), the word "and" at the end shall be omitted;

(iii) after clause (b), the following clause shall be added, namely:—

"(c) the President of the Board may delegate any of his powers under clause (b) to any Commissioner, Assistant Commissioner or officer of the Board, in any case or class of cases, subject to such exceptions, limitations and conditions, if any, as may be specified in the order of delegation."

Insertion of new sections 18-A and 18-B in Madras Act II of 1927.

4. After section 18 of the said Act, the following sections shall be inserted, namely:—

"18-A. (1) Subject to such control as may be prescribed, the President of a Board may divide the area within its jurisdiction into territorial divisions, and assign, subject to the provisions of sub-section (2) and the other provisions of this Act, the powers and duties vested in the Board by or under this Act in respect of all the institutions situated in each of such divisions, to himself or to some other Commissioner.

(2) Subject to control as aforesaid, the President may also assign to himself or to some other Commissioner, either in addition to powers and duties in respect of a territorial division assigned under sub-section (1) or in lieu thereof—

(a) the powers and duties vested in the Board by or under this Act in respect of any class or group of institutions or of any institution, or

(b) any power or duty so vested in respect of all institutions or any class or group thereof.

(3) Subject to control as aforesaid the President may vary the limits of, or cancel, any territorial division made under sub-section (1), or vary or cancel any assignment of powers and duties made under that sub-section or under sub-section (2).

President to be administrative head of Board and to have power to transfer proceedings and call for records.

18-B. The President of a Board shall, subject to the provisions of this Act, be its administrative head for all purposes, and may for reasons to be recorded in writing—

(a) at any stage, transfer any proceeding—

(i) from one Commissioner to another, from himself to any other Commissioner, or from any other Commissioner to himself, or

(ii) from one committee of the Board to another committee thereof;

(b) call for any records connected with any administrative matter, that is to say, any matter not being of a judicial or quasi-judicial nature, disposed of by any other Commissioner, within three months from the date of disposal and direct that the matter shall be reconsidered by a committee of the Board or by the full Board.

Explanation.—Any matter in respect of which a suit or application to the Court is not provided for in this Act shall, for the purposes of clause (b), be deemed to be an administrative matter."

Amendment of section 19, Madras Act II of 1927.

5. In sub-section (1) of section 19 of the said Act—

(i) clause (a) shall be omitted;

(ii) in clause (b), for the words "their decision" the words "the decision of the President and Commissioners of the Board" shall be substituted;

(iii) in clause (d), after the words "committees of commissioners" the words "or to Assistant Commissioners" shall be added;

(iv) in clause (f), after the words "of the Board" the words "or of an Assistant Commissioner" shall be added;

(v) in clause (g), the word "committees" shall be omitted;

(vi) in clause (h), after the words "to the Board," the words "or to Assistant Commissioners" shall be added;

(vi) in clause (i), the words "committees and" and the word "and" occurring at the end shall be omitted;

(viii) clause (j) shall be re-lettered as clause (l) and before the clause as so re-lettered, the following clauses shall be inserted, namely:—

"(j) the persons by whom receipts may be granted for money paid to the Board;

(k) the accounts, returns and reports to be submitted by trustees of religious endowments;"

Repeal of Chapter III of Madras Act II of 1927 and insertion of new Chapter III.

6. Chapter III of the said Act shall be omitted, and in lieu thereof the following Chapter shall be inserted, namely:—

"CHAPTER III.

Assistant Commissioners.

20. (1) For the purpose of assisting a Board in exercising its powers and discharging its duties under this Act, there shall be appointed such number of Assistant Commissioners as the Provincial Government, after consulting the Board, may, from time to time, deem necessary.

(2) An Assistant Commissioner shall be a person professing the Hindu religion and possess such other qualifications as may be prescribed.

(3) Appointment to the post of Assistant Commissioner shall be made by the Provincial Government after consulting the President of the Board.

(4) Assistant Commissioners shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

21. (1) An Assistant Commissioner shall have jurisdiction over such area as may be assigned to him by the President of the Board and shall, subject to the provisions of sub-section (2), exercise such powers and discharge such duties therein as are or may be assigned to him by or under this Act.

(2) The Board may, by order in writing, declare that the exercise and discharge of all or any of the powers and duties so assigned shall be subject to such exceptions, limitations and conditions as may be specified in the order; and may itself exercise or discharge any power or duty so excepted.

Delegation of powers and duties to Assistant Commissioners.

22. The Board may delegate to an Assistant Commissioner any of its powers and duties under this Act subject to such limitations and conditions, if any, as may be specified in the order of delegation.

23. Every Assistant Commissioner shall assist the Board in any manner required by it; and in particular, it shall be his duty to conduct such inquiries and investigations, to take such evidence, to make such inspections, and to furnish such reports, as may be directed by the Board from time to time in regard to any matter.

Duty of Assistant Commissioners to assist Board.

Transfer and withdrawal of proceedings pending before Assistant Commissioners.

24. The President of the Board may, at any stage, transfer any proceeding pending before an Assistant Commissioner for disposal to any other Assistant Commissioner, or withdraw any proceeding so pending for disposal by the Board.

25. (1) The Board may, of its own motion or on the application of any person having interest, call for any records, proceedings or other documents or papers from any Assistant Commissioner, and examine the same for the purpose of satisfying itself as to the correctness, regularity or propriety of any order or proceeding passed or recorded by such Assistant Commissioner; and the Board may in its discretion modify, annul or reverse such order or proceeding, or remit the case to the same or another Assistant Commissioner for disposal.

(2) Pending the exercise of its power under sub-section (1), the Board may stay the execution of any order or proceeding passed or recorded by an Assistant Commissioner.

Board's power in cases of default by Assistant Commissioners.

26. If the Board is satisfied that an Assistant Commissioner has failed to exercise any power or discharge any duty which he ought to have exercised or discharged, the Board may itself exercise such power or discharge such duty.

27. Notwithstanding anything contained in this Act, where no Assistant Commissioner has been appointed for any area, or where the office of an Assistant Commissioner appointed for any area falls vacant, the Board may in such area exercise the powers and discharge the duties assigned by or under this Act to an Assistant Commissioner, until an Assistant Commissioner is appointed or the vacancy is filled, as the case may be.

Certain provisions of Act not to apply to orders and actions under sections 26 and 27.

28. The provisions of this Act relating to appeals to the Board from the orders of an Assistant Commissioner or to approval by the Board of his actions, shall not apply to any order passed or action taken by the Board in pursuance of section 26 or section 27.

Amendment of section 38, Madras Act II of 1927.

7. In section 38 of the said Act—

(i) in the proviso to sub-section (2), for the words "register relating to a temple over which a committee has jurisdiction shall be submitted through the committee which may" the words "register relating to a math or temple over which an Assistant Commissioner has jurisdiction shall be submitted through the Assistant Commissioner who may" and for the word "it" in both the places where it occurs, the word "he" shall be substituted;

(ii) in sub-section (4), for the word "committee" the words "Assistant Commissioner" shall be substituted.

Amendment of section 39, Madras Act II of 1927.

8. In section 39 of the said Act—

(i) in sub-section (2), for the words "and the committee if any" the words "or the Assistant Commissioner, as the case may be," shall be substituted;

(ii) in sub-section (3), for the words "president of the committee" the words "Assistant Commissioner" shall be substituted.

Amendment of section 42, Madras Act II of 1927.

9. In section 42 of the said Act, for the word "committee" occurring in sub-sections (1) and (2) the words "Assistant Commissioner" shall be substituted.

Amendment of section 43, Madras Act II of 1927.

10. In section 43 of the said Act for the word "committee" in sub-section (2) the words "Assistant Commissioner" and for the words "a committee" in sub-section (3) the words "an Assistant Commissioner" shall be substituted.

Amendment of section 44-B, Madras Act II of 1927.

11. In sub-section (2) of section 44-B of the said Act—

(i) in clauses (a) and (b), for the word "committee" wherever it occurs, the words "Assistant Commissioner" shall be substituted;

(ii) in clauses (c) and (d) (i), for the words "to each of the persons and bodies" the words "to the Board and each of the persons" shall be substituted.

Amendment of section 45, Madras Act II of 1927.

12. In sub-section (1), of section 45 of the said Act, for the words "a committee", the words "an Assistant Commissioner" shall be substituted.

Amendment of section 46, Madras Act II of 1927.

13. In section 46 of the said Act—

(i) in clause (b), for the words "a committee", the words "an Assistant Commissioner" shall be substituted;

(ii) in clause (c), for the word "committee" the words "Assistant Commissioner" and for the word "it" the word "he" shall be substituted.

Amendment of section 47, Madras Act II of 1927.

14. In sub-section (2) of section 47 of the said Act, for the word "committee" the words "Assistant Commissioner" shall be substituted.

Amendment of section 48, Madras Act II of 1927.

15. For sub-section (3) of section 48 of the said Act, the following sub-section shall be substituted, namely:—

"(3) The cost of auditing the accounts of an Assistant Commissioner shall be fixed by the Board and met from the funds of the Board."

Amendment of section 51, Madras Act II of 1927.

16. In section 51 of the said Act—

(i) for sub-sections (1) and (2), the following sub-sections shall be substituted, namely:—

"(1) The number of non-hereditary trustees for a temple shall be fixed by the Assistant Commissioner except in respect of temples specified in a list prepared and published by the Board from time to time in the prescribed manner. In respect of the temples specified in such list, the Board shall fix the number of non-hereditary trustees:
in a Court of law."

Provided that the number of non-hereditary trustees shall in no case exceed three.

(2) Non-hereditary trustees shall be appointed by the Board in respect of the temples specified in the list referred to in sub-section (1) and by the Assistant Commissioner in respect of other temples. In making such appointments the Board or the Assistant Commissioner, as the case may be, shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the temple concerned is chiefly maintained.”;

(ii) in sub-section (3), for the word “committee,” the words “Assistant Commissioner or the Board, as the case may be,” shall be substituted;

(iii) sub-section (4) shall be omitted.

Amendment of section 52, Madras Act II of 1927. 17. In section 52 of the said Act, for the words “committee or the President of such Board or committee”, the words “its President or by the Assistant Commissioner” shall be substituted.

Substitution of new sections for section 53, Madras Act II of 1927.

18. For section 53 of the said Act, the following sections shall be substituted, namely:—

Suspension, removal and dismissal of non-hereditary trustees.

“53. (1) The Board in the case of a temple specified in the list referred to in sub-section (1) of section 51 and the Assistant Commissioner in the case of any other temple, may by order suspend, remove or dismiss any non-hereditary trustee—

(a) for persistent default in the submission of budgets, accounts, reports or returns, or

(b) for wilful disobedience of lawful orders issued by the Board or its President, or by the Assistant Commissioner, or

(c) for any malfeasance, misfeasance, breach of trust, or neglect of duty in respect of the trusts, or

(d) for any misappropriation of, or improper dealing with, the properties of the temple of which he is trustee, or

(e) for unsoundness of mind or other physical infirmity which unfits him for discharging the functions of a trustee.

(2) When it is proposed to take action under sub-section (1), the Board or the Assistant Commissioner, as the case may be, shall frame charges against the trustee concerned and give him an opportunity of explanation, of testing the evidence against him and of adducing evidence in his favour and pending the disposal of the charges framed, may place the trustee under suspension and appoint a fit person to discharge the functions of the trustee. The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation and the finding on each charge with the reasons therefor.

(3) A non-hereditary trustee who is suspended, removed or dismissed by an Assistant Commissioner under sub-section (1) may, within three months of the date of the communication of the order of suspension, removal or dismissal, appeal to the Board against such order and the Board shall pass such orders on the appeal as it thinks fit.

(4) Every order passed by the Board under sub-section (1) or under sub-section (3) and every order passed by the Assistant Commissioner under sub-section (1) when no appeal is preferred under sub-section (3), shall be final and shall not be liable to be modified or cancelled in a Court of law.

Suspension, removal and dismissal of hereditary trustees.

53-A. (1) The Board may by order suspend, remove or dismiss any hereditary trustee of a temple for any of the reasons specified in sub-section (1) of section 53.

(2) The powers conferred on the Board by sub-section (1) shall be exercised by a committee of the Board consisting of not less than two Commissioners of whom the President shall be one.

(3) When it is proposed to take action under sub-section (1), the Board shall frame charges against the trustee concerned and give him an opportunity of explanation, of testing the evidence against him and of adducing evidence in his favour and pending the disposal of the charges framed, may place the trustee under suspension and appoint a fit person to discharge the functions of the trustee. The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation and the finding on each charge with the reasons therefor.

(4) A hereditary trustee who is suspended, removed or dismissed by the Board under sub-section (1) may, within three months of the date of the communication of the order of suspension, removal or dismissal, apply to the Court to modify or cancel the order of the Board. The order of the Court on such application shall be final.

(5) Every order passed by the Board under sub-section (1) when no application is made under sub-section (4) shall be final and shall not be liable to be modified or cancelled

Amendment of section
54, Madras Act II of 1927.

19. In section 54 of the said Act—

(i) for clause (a) of sub-section (1) the following clause shall be substituted, namely:—

“(a) is sentenced by a criminal court to transportation or to imprisonment for a period of more than six months (such sentence not having been cancelled or reduced to a period of six months or less, or the offence not having been pardoned) provided that the Provincial Government may direct that such sentence shall not operate as a disqualification”;

(ii) in sub-section (3), for the word “committee”, the word “Board” shall be substituted.

Amendment of section
55, Madras Act II of 1927.

20. In section 55 of the said Act, for the word “committee” wherever it occurs, the words “Assistant Commissioner”, and for the words “it thinks fit” occurring in sub-section (3) the words “he thinks fit” shall be substituted.

Amendment of section
56, Madras Act II of 1927.

21. In section 56 of the said Act, for the word “committee” wherever it occurs, the words “Assistant Commissioner” and for the word “it” occurring in sub-section (3) the word “he” shall be substituted.

Amendment of section
57, Madras Act II of 1927.

22. In section 57 of the said Act, the words “the committee, if any” occurring in sub-section (1) and the words “the committee” occurring in sub-section (3) shall be omitted.

Amendment of section
59, Madras Act II of 1927.

23. In section 59 of the said Act, for the word “committee” the words “Assistant Commissioner” shall be substituted.

24. In section 60 of the said Act, for the words “president or any member of the committee deputed by him in this behalf” the words “Assistant Commissioner having jurisdiction”, and for the words

Amendment of section
60, Madras Act II of 1927.

“president or such member” the words “Assistant Commissioner” shall be substituted.

Repeal of sections 60-A
and 65-D, Madras Act II
of 1927.

25. Sections 60-A and 65-D of the said Act shall be omitted.

Amendment of section
66, Madras Act II of 1927.

26. In the proviso to section 66 of the said Act, for the word “committee” the words “Assistant Commissioner” and for the words “they may think fit” the words “the Board or the Assistant Commissioner may think fit” shall be substituted.

Amendment of section
67, Madras Act II of 1927.

27. In the second paragraph of sub-section (4) of section 67 of the said Act, the words “the committee, if any” shall be omitted.

Amendment of section
68, Madras Act II of 1927.

28. In section 68 of the said Act, for the word “committee” the words “an Assistant Commissioner” shall be substituted.

Amendment of section
69, Madras Act II of 1927.

29. In section 69 of the said Act—

(i) in sub-section (1), for the words “one and a half per centum” the words “three per centum” shall be substituted, and the proviso shall be omitted;

(ii) sub-section (2) shall be omitted and for sub-section (3), the following sub-section shall be substituted, namely:—

“(3) The annual payment referred to in sub-section (1) shall be made notwithstanding anything to the contrary contained in any scheme settled or deemed to be settled under this Act for the math, temple or specific endowment concerned.”

Amendment of section
70, Madras Act II of 1927.

30. In section 70 of the said Act—

(i) in clause (a) of sub-section (2), the words “or committee” and the words “or of the committee, as the case may be” in both the places where they occur shall be omitted;

(ii) in sub-section (3), the words “or of the committee, as the case may be” shall be omitted.

Amendment of section
71, Madras Act II of 1927.

31. In sub-section (2) of section 71 of the said Act—

(i) clauses (b), (c) and (d) shall be omitted;

(ii) in clause (e), after the word “Board” the words “and of Assistant Commissioners” shall be inserted;

(iii) after clause (f), the following clause shall be inserted, namely:—

“(ff) the method of recruitment and qualifications, salaries and allowances, discipline and conduct and generally the conditions of service of Assistant Commissioners”;

(iv) in clause (i), for the word "committees" the words "Assistant Commissioners" shall be substituted;

(v) in clause (j), the words "and its apportionment among Boards and committees" shall be omitted;

(vi) in clause (k), for the word "committees" the words "Assistant Commissioners" shall be substituted.

Amendment of sections 76 and 78, Madras Act II of 1927. 32. In sections 76 and 78 of the said Act, for the word "committee" wherever it occurs the words "Assistant Commissioner" shall be substituted.

33. In section 82 of the said Act, for the word "committee" in the first place where it occurs the words "an Assistant Commissioner" and for the word "committee" in the second and third places where it occurs the words "Assistant Commissioner" shall be substituted.

Repeal of sections 83 and 85, Madras Act II of 1927. 34. Sections 83 and 85 of the said Act shall be omitted.

Repeal and amendment of Schedules to Madras Act II of 1927. 35. (1) Schedules I and III to the said Act shall be omitted.

(2) In Schedule II to the said Act—

(i) for the words "the committee" and "a committee" wherever they occur the words "the Assistant Commissioner" and "an Assistant Commissioner" shall respectively be substituted;

(ii) for the entry relating to section 53 (3), the following entries shall be substituted, namely:—

- | | | |
|-----------|--|-----|
| "53. (3) | Appeal to the Board against an order of suspension, dismissal or removal by the Assistant Commissioner, of a non-hereditary trustee .. | 25 |
| 53-A. (4) | Application to Court against the order of suspension, dismissal or removal by the Board, of a hereditary trustee .. | 25" |

Transitional Provisions.

36. All temple committees constituted or deemed to have been duly constituted under the provisions of the said Act, whether actually or merely deemed to be in existence at the commencement of this Act, are hereby abolished with effect from such commencement.

37. Any reference to a temple committee or the president, vice-president or member thereof contained in any enactment in force in the Province or in any notification, order, scheme, rule, form or by-law made under any such enactment and in force in the said Province shall, after the commencement of this Act, be construed as a reference to the Assistant Commissioner concerned.

Provided that it shall be open to the Board to direct that any such reference shall be construed as a reference to itself or to such other authority or person as may be specified by it.

38. (1) All costs, expenses and contributions payable to temple committees under sections 68 and 69 of the said Act immediately before the commencement of this Act shall be payable to the Board instead, and any assessment or demand of such sums made before such commencement shall be deemed to be valid and may be continued under the said Act, as amended by this Act.

(2) Subject to the provisions of sub-section (1), the Board may pass such orders as it thinks fit as to—

(a) the transfer or disposal otherwise of all property, rights, interests and assets of whatever kind, owned by, or vested in, or held in trust by or for, or used, enjoyed or possessed by, any temple committee abolished by this Act; and

(b) the transfer or discharge of the liabilities of any such committee.

39. All proceedings pending before any temple committee at the commencement of this Act may, in so far as they are not inconsistent with the provisions of the said Act as amended by this Act, be continued under the said Act as so amended, by the Assistant Commissioner concerned or, if the Board so directs in any case or class of cases, by the Board.

Continuance of proceedings taken by or against temple committees.

40. All proceedings taken by or on behalf of, or against, any temple committee and pending at the commencement of this Act may, thereafter, be continued by or against the Board, subject to the provisions of the said Act as amended by this Act.

41. Any remedy by way of application, suit or appeal which is provided by the said Act as amended by this Act shall be available, in respect of proceedings under the said Act pending at the commencement of this Act as if the proceedings in respect of which the remedy is sought had been instituted after such commencement.

42. Any order passed, action taken or thing done by a temple committee before the commencement of this Act shall, subject to the provisions of the said Act as amended by this Act and to such directions as the Board may by general or special order give in this behalf, be deemed to have been taken by the Assistant Commissioner concerned or the Board, as the case may be, unless and until the same is superseded by such Assistant Commissioner or the Board.

Levy of contributions for fasli commencing on 1st July, 1943.

43. Contributions shall be levied from maths, temples and specific endowments for the fasli year commencing on the 1st day of July, 1943, as if the amendments made by this Act to section 69 had come into force on the 1st day of July, 1943.

Officers and servants of temple committees deemed to be officers and servants of the Board.

44. All officers and servants of temple committees holding office immediately before the commencement of this Act shall, subject to such directions, if any, as the Provincial Government may by general or special order give in this behalf, be deemed to have become officers and servants of the Board with effect from such commencement.

45. If any difficulty arises in giving effect to the provisions of this Act or of the said Act as amended by this Act, the Provincial Government as occasion may require may by order do anything which appears to them necessary for the purpose of removing the difficulty.

THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1944.

Act No. VI of 1944.

[23rd March, 1944.]

An Act further to amend the Madras Local Boards Act, 1920.

WHEREAS it is expedient further to amend the Madras Local Boards Act, 1920, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1944.

Amendment of section 80, Madras Act XIV of 1920.

2. To sub-section (1) of section 80 of the Madras Local Boards Act, 1920, the following proviso shall be added, namely:—

"Provided that for the purpose of fixing the rent value of such lands for the triennium comprising the fasli years 1353, 1354 and 1355, the district collector shall have power to require any landholder or sub-landholder to furnish him with a list as aforesaid for all or any of the fasli years 1350, 1351 and 1352."

THE MADRAS COMMERCIAL CROPS MARKETS (AMENDMENT) ACT, 1944.

Act No. VII of 1944.

[24th March, 1944.]

An Act further to amend the Madras Commercial Crops Markets Act, 1933.

WHEREAS it is expedient further to amend the Madras Commercial Crops Markets Act, 1933, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS COMMERCIAL CROPS MARKETS (AMENDMENT) ACT, 1944.

Amendment of section 6, Madras Act XX of 1933. 2. In sub-section (4) of section 6 of the Madras Commercial Crops Markets Act, 1933—

(i) in the first proviso, after the word "Provided", the word "further" shall be inserted, and before the proviso as so amended, the following proviso shall be inserted, namely:—

"Provided that during the continuance of the present war the Provincial Government may, from time to time, extend for such period as they think fit the term of office of all or any of the members of a market committee other than members appointed under the proviso to sub-section (3)";

(ii) in the last proviso, for the words "Provided further", the words "Provided also" shall be substituted.

THE MADRAS DISTRICT MUNICIPALITIES (AMENDMENT) ACT, 1944.

ACT No. VIII OF 1944

[27th March, 1944.]

An Act further to amend the Madras District Municipalities Act, 1920.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES (AMENDMENT) ACT, 1944.

Insertion of new section 81-A in Madras Act V of 1920.

2. After section 81 of the Madras District Municipalities Act, 1920, the following section shall be inserted, namely:—

"81-A. (1) The Provincial Government may by order published in the Official Gazette direct any municipal council to levy the property tax referred to in sub-section (1) of section 78 or any class of such tax, at such rate and with effect from such date (not being earlier than the first day of the half-year immediately following that in which the order is published) as may be specified in the order.

(2) When an order under sub-section (1) has been published, the provisions of this Act relating to property tax shall apply as if the municipal council had on the date of publication of such order by resolution determined to levy the tax at the rate and with effect from the date specified in the order and as if no other resolution of the Council under section 78 determining the rate at which and the date from which property tax shall be levied had taken effect.

(3) A municipal council shall not alter the rate at which the property tax or any class of such tax is levied in pursuance of an order under sub-section (1) or abolish such tax except with the previous sanction of the Provincial Government."

THE MADRAS REGULATION OF THE SALE OF CLOTH (REPEAL) ACT, 1944.

ACT No. IX OF 1944.

[25th April, 1944.]

An Act to repeal the Madras Regulation of the Sale of Cloth Act, 1937.

WHEREAS it is expedient to repeal the Madras Regulation of the Sale of Cloth Act, 1937;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act, in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title and commencement.

1. (1) This Act may be called THE MADRAS REGULATION OF THE SALE OF CLOTH (REPEAL) ACT, 1944.

(2) It shall be deemed to have come into force on the 1st day of April, 1944.

Repeal of Madras Act XII of 1937.

2. The Madras Regulation of the Sale of Cloth Act, 1937, is hereby repealed.

THE MADRAS GENERAL SALES TAX (AMENDMENT) ACT, 1944.

ACT No. X of 1944.

[28th April, 1944.]

An Act further to amend the Madras General Sales Tax Act, 1939.

WHEREAS it is expedient further to amend the Madras General Sales Tax Act, 1939, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title and commencement.

1. (1) This Act may be called THE MADRAS GENERAL SALES TAX (AMENDMENT) ACT, 1944.

(2) It shall be deemed to have come into force on the 1st day of April, 1944.

Amendment of section 3, Madras Act IX of 1939.

2. In sub-section (1) of section 3 of the Madras General Sales Tax Act, 1939 (hereinafter referred to as the said Act), for clause (a), the following clause shall be substituted namely:—

“(a) (i) If his turnover does not exceed fifteen thousand rupees Eight rupees per month.

(ii) If his turnover exceeds fifteen thousand rupees but does not exceed twenty thousand rupees Twelve rupees per month.”

Amendment of section 5, Madras Act IX of 1939.

3. In section 5 of the said Act, the words “of bullion and specie” shall be omitted.

THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1944.

ACT No. XI OF 1944.

[1st July, 1944.]

An Act further to amend the Andhra University Act, 1925.

WHEREAS it is expedient further to amend the Andhra University Act, 1925, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1944.

2. In section 15 of the Andhra University Act, 1925, in clause (4) under the heading “Class III—Other Members”, for the words and figures “in the area which on the 10th June, 1930, was comprised in the districts of”, the words “in the area for the time being comprised within the districts of” shall be substituted.

Amendment of section 15, Madras Act II of 1926.

THE MADRAS TOBACCO TAXATION OF SALES AND LICENSING (REPEAL) AND GENERAL SALES TAX (AMENDMENT) ACT, 1944.

ACT No. XII OF 1944.

[4th July, 1944.]

An Act to repeal the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939, and further to amend the Madras General Sales Tax Act, 1939.

WHEREAS it is expedient to repeal the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939, and further to amend the Madras General Sales Tax Act, 1939, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself the Governor is pleased to enact as follows:—

Short title and com- 1. (1) This Act may be called THE MADRAS TOBACCO
mencement. TAXATION OF SALES AND LICENSING (REPEAL) AND GENERAL
SALES TAX (AMENDMENT) ACT, 1944.

(2) It shall be deemed to have come into force on the 1st day of April, 1944.

Repeal of Madras Act 2. The Madras Tobacco (Taxation of Sales and
VIII of 1939. Licensing) Act 1939 is hereby repealed;

Provided that this repeal shall not in any way affect the levy, or the institution or continuance of any proceedings connected with the levy, of any tax, fee or other sum under the Act hereby repealed or the rules made thereunder, in respect of any period prior to the 1st day of April, 1944.

3. In section 4 of the Madras General Sales Tax Act, 1939, for the expression "manufactured tobacco as defined in the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939", the expression "tobacco in any form whether manufactured or not" shall be substituted.

Amendment of section 4,
Madras Act IX of 1939.

THE TIRUMALAI-TIRUPATI DEVASTHANAMS (AMENDMENT) ACT, 1944.

ACT No. XIII OF 1944.

[3rd July, 1944.

An Act further to amend the Tirumalai-Tirupati Devasthanams Act, 1932.

WHEREAS it is expedient further to amend the Tirumalai-Tirupati Devasthanams Act, 1932, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE TIRUMALAI-TIRUPATI
DEVASTHANAMS (AMENDMENT) ACT, 1944.

Amendment of section 36, Madras Act XIX of 1933. 2. In section 36 of the Tirumalai-Tirupati Devasthanams Act, 1932, after clause (i), the following clause shall be inserted, namely:—

"(i-a) the establishment and maintenance of a first-grade college at or near Tirupati, which shall be mainly residential in character and shall be open to all persons whether professing the Hindu religion or not;"

THE LEGAL PRACTITIONERS (MADRAS AMENDMENT) ACT, 1944.

ACT No. XIV OF 1944.

[1st August, 1944.

An Act further to amend the Legal Practitioners Act, 1879, in its application to the Province of Madras.

WHEREAS it is expedient further to amend the Legal Practitioners Act, 1879, in its application to the Province of Madras, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE LEGAL PRACTITIONERS
(MADRAS AMENDMENT) ACT, 1944.

Amendment of section 36, Act XVIII of 1879. 2. In sub-section (2-B) of section 36 of the Legal Practitioners Act, 1879—

(i) to clause (ii), the following proviso shall be added, namely:—

"Provided that the District Judge may constitute such a Committee (i) for any taluk, at any place situated therein other than its headquarters or (ii) for two or more taluks, at any place situated in those taluks. Before making appointments to any such Committee, the

District Judge shall consult the salaried gazetted Judicial Officers, Civil and Criminal, at the place at which the Committee is to be constituted, or having jurisdiction over the taluk or taluks for which the Committee is to be constituted or any part thereof;

(ii) in clause (vi) for the words "constituted at the headquarters of any taluk" the words "constituted at any other place, whether the headquarters of a taluk or not," and for the words "jurisdiction over the taluk" the words "jurisdiction over the taluk or taluks for which the Committee has been constituted" shall be substituted.

Amendments made by section 2 to have retrospective effect. 3. The amendments made by section 2 shall be deemed to have taken effect from the commencement of the Legal Practitioners (Madras Amendment) Act, 1943.

THE ANDHRA UNIVERSITY (SECOND AMENDMENT) ACT, 1944.

• ACT No. XV OF 1944.

[1st September, 1944.]

An Act further to amend the Andhra University Act, 1925.

WHEREAS it is expedient further to amend the Andhra University Act, 1925, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE ANDHRA UNIVERSITY (SECOND AMENDMENT) ACT, 1944.

Amendment of section 15. 2. In section 15 of the Andhra University Act, 1925 (hereinafter referred to as the said Act), under the heading Madras Act II of 1926, "Class III—Other Members", after sub-clause (b) of clause (8), the following sub-clause shall be inserted, namely:—

"(c) the Maharaja Saheb of Jeypore or his successors shall be entitled to nominate two members who shall hold office for a period of three years; the Maharaja Saheb or his successors shall also be entitled to make a fresh nomination when a vacancy occurs in the office of any such member and every member so nominated shall hold office for a period of three years:

Provided that the Maharaja Saheb or his successors shall be entitled to make nominations under this sub-clause, only—

(i) so long as the present annual contribution of one lakh of rupees to the University continues, or

(ii) if a capitalized grant of fifteen lakhs of rupees to the University is made, in accordance with the deed executed by the Maharaja Saheb:

Provided further that the Maharaja Saheb or his successors shall not, by reason only of making the annual contribution or capitalized grant aforesaid, be entitled to nominate a member under sub-clause (a) or sub-clause (b)."

Amendment of section 18, Madras Act II of 1926. 3. In section 18 of the said Act, under the heading "Class II—Other Members", for clause (3), the following clause shall be substituted, namely:—

"(3) five persons nominated by the Chancellor of whom two shall be persons recommended by the Maharaja Saheb of Jeypore or his successors:

Provided that two persons shall be nominated on the recommendation of the Maharaja Saheb or his successors, only—

(i) so long as the present annual contribution of one lakh of rupees to the University continues, or

(ii) if a capitalized grant of fifteen lakhs of rupees to the University is made, in accordance with the deed executed by the Maharaja Saheb."

Amendment of section 19-A, Madras Act II of 1926. 4. In section 19-A of the said Act, for clause (4), the following clause shall be substituted, namely:—

"(4) two members nominated by the Chancellor from among the five members nominated by him to the Syndicate provided that one of the two members shall be a member nominated to the Syndicate on the recommendation of the Maharaja Saheb of Jeypore or his successors."

THE ANDHRA UNIVERSITY (THIRD AMENDMENT) ACT, 1944.

ACT No. XVI of 1944.

[24th September, 1944.

An Act further to amend the Andhra University Act, 1925.

WHEREAS it is expedient further to amend the Andhra University Act, 1925, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE ANDHRA UNIVERSITY (THIRD AMENDMENT) ACT, 1944.

2: In sub-section (ii) of section 22 of the Andhra University Act, 1925 (hereinafter referred to as the said Act), for the expression "The Academic Council as constituted under sub-clause (i) may co-opt as members teachers of the affiliated colleges not exceeding fifteen", the expression "The Academic Council as constituted under sub-section (i) may co-opt as members not more than fifteen persons from among the teachers of University colleges and affiliated colleges" shall be substituted.

Amendment of section 22, Madras Act II of 1926.

ed under sub-section (i) may co-opt as members of University colleges and affiliated colleges" shall be substituted.

Amendment of section 23, Madras Act II of 1926.

3. In clause (b) of sub-section (2) of section 23 of the said Act, the words "from among its own members" shall be omitted.

THE PERUNDURAI TUBERCULOSIS SANATORIUM (REGULATION OF BUILDINGS) ACT, 1944.

ACT No. XVII of 1944.

[23rd September, 1944.

An Act to provide for the control of the construction of buildings in the neighbourhood of the Tuberculosis Sanatorium at Perundurai and for the exclusion, modification or restriction of enactments relating to public health from or in such neighbourhood.

WHEREAS it is expedient to provide for the control of the construction of buildings in the neighbourhood of the Tuberculosis Sanatorium at Perundurai and for the exclusion, modification or restriction of enactments relating to public health from or in such neighbourhood;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title, application and commencement.

1. (1) This Act may be called THE PERUNDURAI TUBERCULOSIS SANATORIUM (REGULATION OF BUILDINGS) ACT, 1944.

(2) It applies to the Perundurai Sanatorium area as notified by the Provincial Government from time to time in the *Fort St. George Gazette*:

Provided that no place shall be included therein unless it is situated within one mile from some portion of the boundary of the Tuberculosis Sanatorium at Perundurai.

(3) It shall come into force on such date as the Provincial Government may, by notification in the *Fort St. George Gazette*, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(1) 'building' includes—

(a) a house, outhouse, stable, latrine, godown, shed, hut, wall (other than a boundary wall not exceeding eight feet in height) and any other such structure, whether wholly or partially constructed of masonry, bricks, wood, mud, metal or any other material whatsoever;

(b) a structure on wheels or simply resting on the ground without any foundation;

(c) a tent, van and any other structure used for human habitation;

(2) a person shall be deemed to re-erect a building if he—

(a) makes any material alteration to, or enlargement of, a building, or

(b) converts into a dwelling place any building not originally constructed for that purpose, or

(c) converts into two or more dwelling places a building originally constructed as a single dwelling place, or

(d) converts two or more dwelling places into a larger number of such places, or

(e) converts into a stable, cattle-shed or cow-house any building originally constructed as a dwelling place, or

(f) makes any alteration which is likely to affect prejudicially the stability or safety of a building, or the condition of a building in respect of its drainage, sanitation or hygiene, or

(g) makes any alteration to a building which increases or diminishes its height or the area covered by it or the cubic capacity thereof, or which reduces the cubic capacity of any room therein;

(3) 'Sanatorium area' means the area notified under sub-section (2) of section 1.

3. (1) As soon as may be after this Act comes into force, the Provincial Government shall, by notification in the *Fort St. George Gazette* and with effect from such date as may be specified therein, constitute

Constitution of Sanatorium Local Authority.

Authority (hereinafter referred to as the Sanatorium Local Authority), for the purpose of controlling the construction of buildings in the Sanatorium area.

(2) The Sanatorium Local Authority shall consist of—

(a) the President of the Coimbatore District Tuberculosis Sanatorium Society, *ex officio*;

(b) the President of the District Board, Coimbatore, *ex officio*;

(c) the Medical Superintendent of the Tuberculosis Sanatorium at Perundurai, *ex officio*;

(d) the Revenue Divisional Officer, Erode, *ex officio*;

(e) the District Health Officer, Coimbatore, *ex officio*.

(3) The President of the Coimbatore District Tuberculosis Sanatorium Society shall be the Chairman of the Sanatorium Local Authority and the District Health Officer, Coimbatore, shall be its Secretary.

4. The Provincial Government may, by notification in the *Fort St. George Gazette*,

direct that the provisions of the Madras Local Boards Act, 1920, or of the Madras Public Health Act, 1939, or of any other enactment for the time being in force in the Province of Madras and relating to public health, shall not apply to the Sanatorium area or shall apply thereto only to such extent and subject to such modifications and restrictions as may be specified in the notification. In particular, the notification may authorize the Sanatorium Local Authority or its chairman to perform any duty or exercise any power assigned to a panchayat or its president or to any other authority or officer under the provisions so applied, subject to such control as may be specified in the notification.

Prohibition of erection or re-erection of buildings without sanction of Sanatorium Local Authority.

Application for such sanction.

5. No person shall, except with the previous sanction of the Sanatorium Local Authority, erect or re-erect a building on any land in the Sanatorium area, not being land situated within the boundary of the Tuberculosis Sanatorium at Perundurai.

6. (1) Application for such sanction shall be made in writing and shall—

(a) specify the purpose for which it is intended to use the building; and

(b) furnish such information and be accompanied by such plans as may be required by rules made under this Act.

(2) The applicant shall also furnish to the Sanatorium Local Authority any further information or plans which it may require, within such time as may be fixed by it.

7. (1) The Sanatorium Local Authority may refuse to sanction the erection or re-erection of a building, or may sanction such erection or re-erection either unconditionally or subject to such conditions as it thinks fit to impose in respect of all or any of the following matters, namely:—

(a) the free passage or way to be left in front of the building;

(b) the open space to be left about the building to secure free circulation of air and the prevention of fire and to facilitate scavenging;

(c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storeys of which the building may consist;

(d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for rubbish or filth;

(e) the level and width of the foundation, the level of the lowest floor, and the stability of the structure;

(f) the line of frontage with neighbouring buildings if the building abuts on a street;

(g) the means to be provided for egress from the building in case of fire;

(h) the materials to be used for, and the method of construction of, external and partition walls, rooms, floors, fireplaces and chimneys;

(i) the height and slope of the roof above the uppermost floor on which human beings are to live or cooking is to be done;

(j) any other matter affecting the ventilation and sanitation of the buildings.

(2) Any conditions imposed under sub-section (1) shall be in writing, and the person erecting or re-erecting the building shall comply therewith in every particular.

8. Every sanction given for the erection or re-erection of a building shall be available

Lapse of sanction.

for a period of one year from the date on which it is given, and if the sanctioned erection or re-erection is not commenced within that period, it shall not be commenced thereafter, unless the Sanatorium Local Authority on application made therefor has extended the period.

Punishment for illegal erection or re-erection.

9. Whoever begins, continues or completes the erection or re-erection of a building—

(a) before such erection or re-erection has been sanctioned by the Sanatorium Local Authority, or

(b) without complying with any condition imposed under section 7, or

(c) when sanction has been refused by the Sanatorium Local Authority, or after the sanction has ceased to be available by virtue of the provision contained in section 8, shall be punished with fine which may extend to five hundred rupees.

Power to stop erection or re-erection or to order demolition, etc.

10. (1) The Sanatorium Local Authority may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the Sanatorium area—

(a) to stop the erection or re-erection of any building, or

(b) to alter or demolish, within such time as may be specified in the notice, any building or any part thereof,

if, in the opinion of such authority, the erection or re-erection of such building or part constituted, or will constitute, an offence under section 9.

(2) If any direction given under clause (b) of sub-section (1) is not complied with, within the time specified therefor in the notice, the Sanatorium Local Authority may have such direction carried into effect at its cost and have the amount thereof recovered from the defaulter in such manner as may be authorized by the rules.

11. (1) Any person aggrieved by any order passed under this Act by the Sanatorium Local Authority may appeal to the District Collector

Appeals and revision. who shall pass such orders thereon as he thinks fit.

(2) The Provincial Government may, in their discretion, at any time, either *suo motu* or on application, call for and examine the record of any order passed under this Act by the Sanatorium Local Authority or the District Collector for the purpose of satisfying themselves as to the legality or propriety of such order, and may pass such order in reference thereto as they think fit.

Bar of compensation.

12. No compensation shall be claimed by any person for any damage or loss sustained by him in consequence of—

(a) the refusal of the Sanatorium Local Authority to sanction the erection or re-erection of any building, or

(b) any condition imposed by such authority in regard to such erection or re-erection under section 7, or of any order passed by it under section 10, or

(c) any order passed by the District Collector or the Provincial Government under section 11.

Power to make rules.

13. (1) The Provincial Government may, by notification in the *Fort St. George Gazette*, make rules to carry out all or any of the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the rules of business of the Sanatorium Local Authority;

(b) the manner in which applications for sanction to erect or re-erect buildings shall be made to the Sanatorium Local Authority and the information and plans to be furnished either along with such applications or subsequently;

(c) the type or description of building which may or may not, and the purpose for which a building may or may not, be erected or re-erected in any specified area or areas;

(d) the minimum cubic capacity of any room or rooms in a building which is to be erected or re-erected;

(e) the circumstances in which a mosque, temple, church or other sacred building may be erected or re-erected;

(f) the manner in which the cost referred to in section 10 may be recovered;

(g) the form in which and the time within which appeals under section 11 may be preferred;

(h) the fees which may be charged in respect of any application made, appeal preferred, or proceeding taken, under this Act.

THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (SECOND AMENDMENT) ACT, 1944.

ACT No. XVIII OF 1944.

[31st October, 1944.]

An Act further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (SECOND AMENDMENT) ACT, 1944.

Short title.

Amendment of Madras Act V of 1920.

2. In the Madras District Municipalities Act, 1920—

(i) in the first proviso to sub-section (3) of section 78, for the words "shall publish a notice in the district gazette and at least one vernacular newspaper of its intention", the words "shall publish a notice in at least one vernacular newspaper, on the notice board of the municipal office and in such other places within municipal limits as may be specified by the council and by beat of drum, of its intention" shall be substituted;

(ii) in section 266, for the word "notified", the word "specified" shall be substituted;

(iii) to section 328, the following proviso shall be added, namely:—

"Provided that the Provincial Government shall have power to direct that any such notification—

(i) shall be published in the said gazette either in English or in a vernacular language of the district; or

(ii) shall, instead of being published in the said gazette, be published in any other manner specified by them."

Amendment of Madras Act XIV of 1920.

3. In the Madras Local Boards Act, 1920—

(i) in section 178, for the word "notified", the word "specified" shall be substituted;

(ii) to section 215, the following proviso shall be added, namely:—

"Provided that the Provincial Government shall have power to direct that any such notification—

(i) shall be published in the said gazette either in English or in a vernacular language of the district; or

(ii) shall, instead of being published in the said gazette, be published in any other manner specified by them."

THE MADRAS DISTRICT MUNICIPALITIES (SECOND AMENDMENT) ACT,
1944.

ACT No. XIX of 1944.

[7th December, 1944.

An Act further to amend the Madras District Municipalities Act, 1920.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES (SECOND AMENDMENT) ACT, 1944.

Insertion of new section 77-B in Madras Act V of 1920.

2. After section 77-A of the Madras District Municipalities Act, 1920, the following section shall be inserted, namely:—

"77-B. Notwithstanding anything contained in this Act, where a college maintained by a municipal council is affiliated to a University, the management of the college shall, if the laws of the University so required, vest in a governing body constituted in accordance with such laws and such governing body shall exercise in relation to the members of the teaching staff and the establishment of the college all powers of appointment, control and punishment which by or under the Act vest in the committee referred to in section 73 or in the executive authority."